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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 42

JOSEPH J. WEISS, MARTIN GROSS, DR. GEORGE KRUPP AND DR. MAXIMILIAN GOLDSTEIN, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 6, 1939.

CERTIORARI GRANTED JUNE 5, 1939.

SUPREME COURT OF THE UNITED STATES

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IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

INDICTMENT

Southern District of New York, ss: The Grand Jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Southern District of New York, and inquiring for that district, upon their oath present:

That heretofore, to wit, on or about the 15th day of January, 1934 and continuously thereafter up to the date of the filing of this indictment, in the Southern District of New York and within the jurisdiction of this Court, Joseph J. Weiss, Alfred L. Weiss, Martin Gross, Dr. Hirsch L. Messman, Dr. Maximilian Goldstein, Dr. George Krupp, Benjamin Nelson, Herman Berger and Morris Spitz, the defendants herein, and divers other persons whose names are to the Grand Jurors unknown, unlawfully, willfully and knowingly devised and intended to devise a scheme and artifice to defraud and for obtaining money by means of false and fraudulent pretenses, representations and promises from life and health and accident insurance companies including the Metropolitan Life Insurance Company, The Equitable Life Assurance Society of the United States; The Prudential Insurance Company of America, The Mutual Life Insurance Company of New York, the New York Life Insurance Company, The Massachusetts Protective Association, Inc., The Maccabees, The Travelers Insurance Company and the Mutual Benefit Health & Accident Association, hereinafter referred to as the victims, by inducing and attempting to induce said victims by false and fraudulent pretenses, representations and promises to give, advance, loan, pay and deliver their money and property to said defendants in payment and settlement of false and fraudulent claims for disability and health and accident benefits on policies of insurance, in that the said defendants would cause the holders of said policies of insurance, hereinafter referred to as the claimants, to file with the said victims false and fraudulent [fol. 5] claims for disability and health and accident benefits, and would falsely and fraudulently create and manufacture and aid in the creation and manufacture of false and ficti-

tious histories, diagnoses and ailments for the said claimants which would deceive the victims and falsely and fraudulently induce them to part with their money and property in the belief that said claimants were in truth and in fact permanently and totally disabled, by the means and in the manner hereinafter described.

It was a part of said scheme and artifice to defraud that the defendants Joseph J. Weiss and Alfred L. Weiss would maintain law offices known as the law offices of J. J. & A. L. Weiss, in the Borough of Manhattan, City of New York, and would lend the facilities of their offices to, and advise, counsel, handle, supervise and aid in the presentation to, and obtaining the approval by, the victims of false and fraudulent claims for disability and health and accident benefits on policies of insurance, which said claims the defendants Joseph J. Weiss and Alfred L. Weiss then and there knew to be in all respects false and fraudulent.

It was further a part of said scheme and artifice to defraud that the defendants Joseph J. Weiss and Alfred L. Weiss would, on occasions, pay the expenses incident to the creation and fabrication of the aforementioned fraudulent claims, make payments of insurance premiums, payments to various doctors for certifying to, and aiding in obtaining the approval by, the victims of the said fraudulent claims, payments to hospitals for fraudulent hospitalization and divers other incidental expenses to the Grand Jurors unknown.

It was further a part of said scheme and artifice to defraud that the defendant Martin Gross, hereinafter referred to as a "chaser", would seek out and bring to the law offices of the defendant- Joseph J. Weiss and Alfred L. Weiss the defendant Benjamin Nelson who held policies of life insurance containing provisions entitling him to payment of disability benefits only in the event of permanent and total disability, and policies of health and accident insurance, for [fol. 6] the purpose of having the said defendant Benjamin Nelson file false and fraudulent claims for disability and health and accident benefits in the manner hereinafter described, and, in return therefor, the defendant Martin Gross would be compensated by the defendants in amounts to the Grand Jurors unknown in the event the said insurance claims were paid by the victims.

It was further a part of said scheme and artifice to defraud that the defendant Benjamin Nelson would seek out with the

aid of the defendant Martin Gross the defendants Herman Berger and Morris Spitz who held policies of life and health and accident insurance containing provisions similar to those in the insurance policies of the defendant Benjamin Nelson, and bring said defendants Herman Berger and Morris Spitz to the law offices of the defendants Joseph J. Weiss and Alfred L. Weiss for the purpose of having said defendants Herman Berger and Morris Spitz file false and fraudulent claims for disability and health and accident benefits in the manner hereinafter described, and in return therefor the defendants Benjamin Nelson and Martin Gross would be compensated by the defendants in amounts to the Grand Jurors unknown in the event said insurance claims were paid by the victims.

It was further a part of said scheme and artifice to defraud that the defendants would create and manufacture and aid in the creation and manufacture of false, simulated and fictitious ailments for the defendants Benjamin Nelson, Herman Berger and Morris Spitz which would deceive the doctors and other representatives of the victims and induce said victims to part with their money and property in the belief that said claimants were actually permanently and totally disabled.

It was further a part of said scheme and artifice to defraud that the defendants Benjamin Nelson, Herman Berger and Morris Spitz, with the knowledge and consent of the codefendants, would file false and fraudulent claims with various life and health and accident insurance companies as follows: Benjamin Nelson with the Metropolitan Life Insurance Company, The Prudential Insurance Company [fol. 7] of America, The Maccabees and The Equitable Life Assurance Society of the United States; Herman Berger with the Metropolitan Life Insurance Company, The Maccabees and The Massachusetts Protective Association, Inc., and Morris Spitz with the New York Life Insurance Company, The Travelers Insurance Company, The Equitable Life Assurance Society of the United States, The Mutual Life Insurance Company of New York, The Maccabees and the Mutual Benefit Health & Accident Association, respectively, with which said companies the said defendants Benjamin Nelson, Herman Berger and Morris Spitz held policies of life and health and accident insurance entitling them to payments in various sums in the event of their permanent and total disability which said claims would falsely

and fraudulently state that said defendants were suffering from various diseases and ailments of the heart of a permanently and totally disabling character and that said diseases and disability had existed for a long period of time prior to the filing of said claims, to wit, the defendant Benjamin Nelson since approximately the 13th day of June 1935, Herman Berger since approximately the 10th day of December, 1936, and Morris Spitz since approximately the month of December, 1936, whereas in truth and in fact, as the defendants then and there well knew, they were not suffering from any of the said diseases and ailments, nor had they been so suffering since the dates specified in said claims and the said claims were false and fraudulent.

It was further a part of said scheme and artifice to defraud that the defendants would advise, instruct and coach the Defendants Benjamin Nelson, Herman Berger and Morris Spitz as to the history and symptoms of various diseases and ailments of the heart and that the said defendants Benjamin Nelson, Herman Berger and Morris Spitz, with the knowledge and consent of the codefendants, would falsely and fraudulently represent and pretend to the doctors and other representatives of the victims that they suffered from the following: squeezing pain in the left chest with the pain radiating up to the left shoulder and down to the left hand, numbness of the fingers, feat of impending death, cold sweats, shortness of breath, frequent attacks of dizziness, weakness, recurring tired spells, frequent nocturnal urination, palpitation of the heart and discomfort at night when [fol. 8] not sleeping in an upright position, for the purpose of deceiving the doctors and other representatives of the victims into making diagnoses that the said defendants were suffering from diseases and ailments of the heart of a permanently and totally disabling character, whereas in truth and in fact, as the defendants then and there well knew, the said defendants Benjamin Nelson, Herman Berger and Morris Spitz were not suffering from the aforesaid symptoms.

It was further a part of said scheme and artifice to defraud that the defendants Benjamin Nelson, Herman Berger and Morris Spitz, with the knowledge and consent of the codefendants, would undergo fraudulent hospitalization at the Sydenham, Wadsworth and Park East Hospitals respectively, for false, simulated and fictitious diseases and ailments of the heart, and would feign and simulate heart attacks and complain of various symptoms of heart disease

while remaining at the aforesaid hospitals, for the purpose of establishing hospital records and making it appear to the victims that said defendants were suffering from diseases and ailments of the heart of a permanently and totally disabling character, whereas in truth and in fact, as the defendants then and there well knew, the defendants Benjamin Nelson, Herman Berger and Morris Spitz did not suffer from any heart attacks or have any of the various symptoms of heart disease as falsely and fraudulently pretended by them.

It was further a part of said scheme and artifice to defraud that the defendants Dr. Hirsch L. Messman, Dr. Maximilian Goldstein and Dr. George Krupp, with the knowledge and consent of the codefendants, would falsely and fraudulently certify to the victims as to the dates and occasions on which said defendant doctors first treated the defendants Benjamin Nelson, Herman Berger and Morris Spitz for the aforesaid symptoms, diseases and ailments of the heart, and as to the dates and occasions of subsequent treatments, whereas in truth and in fact, as the defendants then and there well knew, the defendants Dr. Hirsch L. Messman, Dr. Maximilian Goldstein and Dr. George Krupp did not treat the defendants Benjamin Nelson, Herman Berger and Morris Spitz on the dates specified in said [fol. 9] certificates, nor on any other dates, for any of the aforesaid symptoms, diseases and ailments of the heart, and said certificates were false and fraudulent.

It was further a part of said scheme and artifice to defraud that the defendants Benjamin Nelson and Herman Berger, with the knowledge and consent of the codefendants, would medicate themselves by taking pills containing digitalis or some derivative thereof, and other drugs to the Grand Jurors unknown, prior to the taking of electrocardiograms for the false and fraudulent purpose of creating electrocardiograms which would record irregularities of, and damage to, their hearts.

It was further a part of said scheme and artifice to defraud that prior to the required examinations by the doctors employed by the various victims, the defendants Benjamin Nelson and Herman Berger, with the knowledge and consent of the codefendants, would take pills containing digitalis or some derivative thereof, and other drugs to the Grand Jurors unknown, and do various things which would affect the normal function of the heart so that in the event the doctors employed by the respective victims desired to take

electrocardiograms or make physical examinations of the said defendants Benjamin Nelson and Herman Berger, said electrocardiograms and physical examinations would falsely and fraudulently record and disclose irregularities of, and damage to, their hearts.

It was further a part of said scheme and artifice to defraud that the defendants Herman Berger and Morris Spitz, prior to the filing of their said fraudulent claims, with the knowledge and consent of the codefendants, would submit to examinations by eminent heart specialists with high standing in the medical profession, and seek their opinions of the result of said examinations, and would, if said opinions were favorable, submit the same to the respective victims.

It was further a part of said scheme and artifice to defraud that the defendants Herman Berger and Morris Spitz, with the knowledge and consent of the codefendants, would falsely and fraudulently represent and pretend to the said specialists that they suffered from the various symptoms [fol. 10] and diseases of the heart hereinbefore set forth, and further, the defendant Herman Berger, prior to the examinations by said specialists, would falsely and fraudulently medicate himself by taking pills containing digitalis or some derivative thereof and other drugs to the Grand Jurors unknown, so that the electrocardiograms taken by the said specialists would record irregularities of, and damage to his heart, and the said defendants Herman Berger and Morris Spitz would thereby deceive the said specialists into diagnosing and certifying that they were suffering from various diseases of the heart of a permanently and totally disabling character, whereas in truth and in fact, as the defendants then and there well knew, the defendants Herman Berger and Morris Spitz did not suffer from any of the symptoms or diseases aforementioned.

It was further a part of said scheme and artifice to defraud that the defendants Joseph J. Weiss and Alfred L. Weiss would charge and deduct certain amounts of money, the exact amounts being to the Grand Jurors unknown, from the various sums paid by the respective victims on the false and fraudulent claims filed by and on behalf of the defendants Benjamin Nelson, Herman Berger and Morris Spitz.

And all the aforesaid representations, pretenses and promises were in fact made, which representations, pre-

tenses and promises were false and fraudulent and without foundation in fact, to the knowledge of the defendants Joseph J. Weiss, Alfred L. Weiss, Martin Gross, Dr. Hirsch L. Messman, Dr. Maximilain Goldstein, Dr. George Krupp, Benjamin Nelson, Herman Berger and Morris Spitz, and such false and fraudulent representations, pretenses and promises were intended by the defendants to be false and fraudulent at the time made and were intended thereby to deceive and defraud the said victims, and induce said victims to part with their money and property, it being the purpose and plan of said defendants to obtain the said money and property from said victims and to convert and appropriate the same to their own use and benefit in various amounts to the Grand Jurors unknown.

[fol. 11] And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, at the Southern District of New York and within the jurisdiction of this Court, on or about the 27th day of March 1937 did unlawfully, wilfully and knowingly place and cause to be placed in an authorized depository for mail matter, to wit, a Post Office in the City, State and Southern District of New York, to be sent and delivered by the Post Office Establishment of the United States, a certain writing, to wit, a letter dated March 27, 1937, signed "Irma Spitz," enclosed in a postpaid envelope, addressed to:

Mutual Life Ins. Co.,
34 Nassau Street,
New York.

which letter referred to the disability claim of Morris Spitz; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Section 338, Title 18, U. S. C.; Section 215 U. S. C. C.)

Second Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment except the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, at the Southern District of New York and within the jurisdiction of this Court, on or about the 27th day of March 1937 did unlawfully, wilfully and knowingly place and cause to be placed in an authorized depository for mail matter, to wit, a Post Office in the City, State and Southern District of New York, to be sent and delivered by the Post Office [fol. 12] Establishment of the United States, a certain writing, to wit, a letter dated March 27, 1937, signed "Irma Spitz," enclosed in a postpaid envelope, addressed to:

Massachusetts Mutual Life Ins. Co.
Springfield, Mass.

which letter referred to the disability claim of Morris Spitz; against the peace of the United States and their dignity and contrary to the form of the Statute of the United States in such case made and provided (Section 338, Title 18, U. S. C.; Section 215 U. S. C. C.).

Third Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment except the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, at the Southern District of New York and within the jurisdiction of this Court, on or about the 27th day of March 1937 did unlawfully, wilfully and knowingly place and cause to be placed in an authorized depository for mail matter, to wit, a Post Office in the City, State and Southern District of New York, to be sent and delivered by the Post Office Establishment of the United States, a certain writing, to wit, a letter dated March 27, 1937, signed "Irma Spitz," enclosed in a postpaid envelope, addressed to:

Equitable Life Assurance Society
393 Seventh Ave.
New York, N. Y.

which letter referred to the disability claim of Morris Spitz; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 338, Title 18, [fol. 13] U. S. C.; Section 215 U. S. C. C.)

Fourth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment except the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, at the Southern District of New York and within the jurisdiction of this Court, on or about the 27th day of March 1937 did unlawfully, wilfully and knowingly place and cause to be placed in an authorized depository for mail matter, to wit, a Post Office in the City, State and Southern District of New York to be sent and delivered by the Post Office Establishment of the United States, a certain writing, to wit, a letter dated March 27, 1937, signed "Irma Spitz," enclosed in a postpaid envelope, addressed to:

New York Life Ins. Co.
51 Madison Avenue
New York, N. Y.

which letter referred to the disability claim of Morris Spitz; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Section 338, Title 18 U. S. C.; Section 215 U. S. C. C.)

Fifth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment except

the allegations contained in the last paragraph of the First [fol. 14] Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count,

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, at the Southern District of New York and within the jurisdiction of this Court, on or about the 27th day of March 1937 did unlawfully, wilfully and knowingly place and cause to be placed in an authorized depository for mail matter, to wit, a Post Office in the City, State and Southern District of New York, to be sent and delivered by the Post Office Establishment of the United States, a certain writing, to wit, a letter dated March 27, 1937, signed "Irma Spitz," enclosed in a postpaid envelope, addressed to:

The Travelers Ins. Co.
Hartford, Conn.

which letter referred to the disability claim of Morris Spitz; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 338, Title 18, U. S. C.; Section 215 U. S. C. C.)

Sixth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment except the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, at the City, State and Southern District of New York and within the jurisdiction of this Court, on or about the 6th day of April 1937 did unlawfully, wilfully and knowingly place and cause to be placed in an authorized depository for mail matter, to wit, a Post Office in the City, State and Southern [fol. 15] District of New York, to be sent and delivered by the Post Office Establishment of the United States, a cer-

tain writing, to wit, a letter signed "Morris Spitz," enclosed in a postpaid envelope, addressed to:

Equitable Life Assurance Society,
393 Seventh Avenue,
New York, N. Y.

which said letter referred to an authorization to the Equitable Life Assurance Society for information concerning treatment of claimant Morris Spitz; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 338, Title 18, U. S. C.; Section 215 U. S. C. C.)

Seventh Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment except the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, at the City, State and Southern District of New York and within the jurisdiction of this Court, on or about the 18th day of April 1937 did unlawfully, wilfully and knowingly place and cause to be placed in an authorized depository for mail matter, to wit, a Post Office in the City, State and Southern District of New York, to be sent and delivered by the Post Office Establishment of the United States, a certain writing, to wit, a letter dated April 18, 1937 signed "Morris Spitz," enclosed in a postpaid envelope, addressed to:

Equitable Life Assur. Soc.,
393 Seventh Avenue,
New York, N. Y.

enclosing therewith claimant's statement of disability claim [fol. 16] and medical reports referring thereto; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 338, Title 18, U. S. C.; Section 215 U. S. C. C.)

Eighth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment, except the allegations contained in the last paragraph of the First Count beginning with the words, "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, at the City, State and Southern District of New York and within the jurisdiction of this Court, on or about the 19th day of May 1937 did unlawfully, wilfully and knowingly place and cause to be placed in an authorized depository for mail matter, to wit, a Post Office in the City, State and Southern District of New York, to be sent and delivered by the Post Office Establishment of the United States, a certain writing, to wit, a letter dated May 17, 1937 signed "Morris Spitz," enclosed in a postpaid envelope, addressed to:

Mutual Life Ins. Co.,
34 Nassau Street,
New York, N. Y.

which letter referred to the disability of Morris Spitz; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 338, Title 18, U. S. C.; Section 215 U. S. C. C.)

Ninth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment, except [fol. 17] the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, at the City, State and Southern District of New York and within the jurisdiction of this Court, on or about the 21st

day of June, 1935, did unlawfully, wilfully and knowingly place and cause to be placed in an authorized depository for mail matter, to wit, a Post Office in the City, State and Southern District of New York, to be sent and delivered by the Post Office Establishment of the United States, a certain writing, to wit, a letter dated June 21, 1935 signed "Benjamin H. Nelson," enclosed in a postpaid envelope addressed to:

The Equitable Life Assurance Soc.,
393 Seventh Avenue,
New York, N. Y.

which said letter referred to the claim for health and accident benefits of Benjamin H. Nelson; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 338, Title 18, U. S. C.; Section 215, U. S. C. C.)

Tenth Count

And the Grand Jurors aforesaid, upon their oath aforesaid further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment, except the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein at the City, State and Southern District of New York and within the jurisdiction of this Court, on or about the 16th [fol. 18] day of April, 1936, did unlawfully, wilfully and knowingly cause to be delivered by mail according to the directions thereon by the Post Office Establishment of the United States, a certain writing, to wit, a letter dated April 15, 1936, signed "J. J. & A. L. Weiss by Joseph J. Weiss," enclosed in a postpaid envelope, addressed to:

Metropolitan Life Insurance Company
1 Madison Avenue
New York City

which said letter referred to the disability claim of Benjamin Nelson; against the peace of the United States and

their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 338, Title 18, U. S .C.; Section 215, U. S. C. C.)

Eleventh Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment, except the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendant herein, at the City, State and Southern District of New York and within the jurisdiction of this Court, on or about the 23rd day of April 1936, did unlawfully, wilfully and knowingly cause to be delivered by mail according to the directions thereon by the Post Office Establishment of the United States, a certain writing, to wit, a letter dated April 22, 1936, signed "J. J. & A. L. Weiss by Joseph J. Weiss," enclosed in a postpaid envelope addressed to:

Metropolitan Life Insurance Co.,
1 Madison Avenue,
New York City

which said letter referred to checks for disability benefits [fol. 19] in the disability claim of Benjamin Nelson; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 338, Title 18, U. S. C.; Section 215 U. S. C. C.)

Twelfth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment, except the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, at the City, State and Southern District of New York and within the jurisdiction of this Court, on or about the 2nd day of May 1935 did unlawfully, wilfully and knowingly place and cause to be placed in an authorized depository for mail matter, to wit, a Post Office in the City, State and Southern District of New York, to be sent and delivered by the Post Office Establishment of the United States, a certain writing, to wit, a letter signed "Mrs. B. Nelson," enclosed in a postpaid envelope, addressed to:

Equitable Life Assurance Society,
393 Seventh Avenue,
New York, N. Y.

which letter referred to the alleged sickness of the claimant Benjamin Nelson, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 330, Title 18, U. S. C.; Section 215 U. S. C. C.)

Thirteenth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allega- [fol. 20] tions contained in the First Count of this indictment except the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants, herein, at the City, State and Southern District of New York and within the jurisdiction of this Court, on or about the 21st day of October, 1936 did unlawfully, wilfully and knowingly cause to be delivered by mail according to the directions thereon by the Post Office Establishment of the United States, a certain letter to wit, a certificate of attending physician dated October 16, 1936 signed "Hirsch L. Messman, M. D.," enclosed in a postpaid envelope, addressed to:

Equitable Life Assurance Society of U. S.,
393 Seventh Avenue,
New York City

and referred to the disability claim and alleged illness of Benjamin Nelson; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 338, Title 18, U. S. C.; Section 215, U. S. C. C.)

Fourteenth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment, except the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, [fol. 21] at the City, State and Southern District of New York and within the jurisdiction of this Court, on or about the 15th day of February, 1937 did unlawfully, wilfully and knowingly cause to be delivered by mail according to the directions thereon by the Post Office Establishment of the United States, a certain writing, to wit, a letter, dated February 12, 1937, signed "Herman Berger," enclosed in a postpaid envelope, addressed to:

Metropolitan Life Insurance Co.,
1 Madison Avenue,
New York City.

which letter referred to the alleged sickness of the claimant Herman Berger; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 338, Title 18, U. S. C.; Section 215 U. S. C. C.)

Fifteenth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment except the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, at the City, State and Southern District of New York and within the jurisdiction of this Court, on or about the 18th day of February 1937 did unlawfully, wilfully and knowingly place and cause to be placed in an authorized depository for mail matter, to wit, a Post Office in the City, State and Southern District of New York, to be sent and delivered by the Post Office Establishment of the United States, a certain writing to wit, a letter dated February 18, 1937 from the Metropolitan Life Insurance Company; signed "E. J. Spellman, Supervisor," enclosed in a postpaid envelope, addressed to:

[fol. 22] Mr. Herman Berger,
79 Amherst Street,
Brooklyn, N. Y.

which letter referred to the claim for total disability of Herman Berger; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 338, Title 18, U. S. C.; Section 215 U. S. C. C.)

Sixteenth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment, except the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, at the City, State and Southern District of New York and within the jurisdiction of this Court, on or about the 2nd day of April 1937 did unlawfully, wilfully, and knowingly cause to be delivered by mail according to the directions thereon by the Post Office Establishment of the United States, a certain writing, to wit, a letter signed "Herman Berger," enclosed in a postpaid envelope, addressed to:

Metropolitan Life Insurance Co.,
1 Madison Avenue,
New York, N. Y.

containing attending physicians certificates and referring to the alleged illness of the claimant Herman Berger; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 338, Title 18, U. S. C.; Section 215 U. S. C. C.)

Seventeenth Count

[fol. 23] And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment except the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, at the City, State and Southern District of New York and within the jurisdiction of this Court, on or about the 5th day of April, 1937 did unlawfully, wilfully and knowingly place and cause to be placed in an authorized depository for mail matter, to wit, a Post Office in the City, State and Southern District of New York, to be sent and delivered by the Post Office Establishment of the United Sta-es, a certain writing, to wit, a letter dated April 5, 1937 from the Metropolitan Life Insurance Company, signed "E. J. Spellman, Supervisor," enclosed in a postpaid envelope addressed to:

Mr. Herman Berger,
79 Amherst Street,
Brooklyn, N. Y.

which letter referred to two attending physicians' statements enclosed in said letter and forwarded by claimant Herman Berger; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 338, Title 18, U. S. C.; Section 215, U. S. C. C.)

Eighteenth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allega-

tions contained in the First Count of this indictment except the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of [fol. 24] executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, at the City, State and Southern District of New York and within the jurisdiction of this Court, on or about the 4th day of May, 1937 did unlawfully, wilfully and knowingly cause to be delivered by mail according to the directions thereon by the Post Office Establishment of the United States, a certain writing, to wit, a letter dated May 3, 1937, signed "Joseph J. Weiss," enclosed in a postpaid envelope addressed to:

Massachusetts Protective Association, Inc.,
19 West 44th Street,
New York City

which letter referred to retainer in connection with the disability claim of Herman Berger, against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 338, Title 18, U. S. C.; Section 215, U. S. C. C.).

Nineteenth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, further present that they do hereby reaffirm, reallege and incorporate as if herein set forth in full all the allegations contained in the First Count of this indictment except the allegations contained in the last paragraph of the First Count beginning with the words "And for the purpose of executing the said scheme and artifice" and continuing to the end of the First Count.

And for the purpose of executing said scheme and artifice to defraud and attempting so to do, the defendants herein, at the City, State and Southern District of New York and within the jurisdiction of this Court, on or about the 4th day of February, 1937 did unlawfully, wilfully and knowingly cause to be delivered by mail according to the directions thereon by the Post Office Establishment of the United States, a certain writing, to wit, a letter dated February 3, 1937 from the Park East Hospital, signed "H. B. Phillips,

[fol. 25] M.D.," enclosed in a postpaid envelope addressed to:

Dr. H. L. Messman,
315 Central Park West,
New York City

which said letter referred to the alleged illness of Morris Spitz; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 338, Title 18, U. S. C.; Section 215 U. S. C. C.)

Twentieth Count

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that heretofore, to wit, on or about the 15th day of January 1934, and continuously thereafter up to the date of the filing of this indictment, in the City, State and Southern District of New York and within the jurisdiction of this Court, Joseph J. Weiss, Alfred L. Weiss, Martin Gross, Dr. Hirsch L. Messman, Dr. Maximilian Goldstein, Dr. George Krupp, Benjamin Nelson, Herman Berger and Morris Spitz, the defendants herein, and divers other persons whose names are to the Grand Jurors unknown, unlawfully, wilfully and knowingly conspired, combined, confederated and agreed together and with each other and with divers other persons to the Grand Jurors unknown, to commit an offense against the United States, to wit, to violate Title 18, Section 338, United States Code, in the manner and by the means described in Count One of this indictment beginning with the words in the third paragraph "It was a part of said scheme and artifice to defraud that the defendants Joseph J. Weiss and Alfred L. Weiss would maintain," and continuing through the last paragraph of Count One, said paragraph beginning with the words "And for the purpose of executing said scheme and artifice to defraud," each and every allegation contained in said portion of Count One being reaffirmed, realleged and incorporated herein as if set forth in full.

Overt Acts

1. In pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and [fol. 26] within the jurisdiction of this Court, during the

month of September, 1934, the defendants Martin Gross, Benjamin Nelson and Dr. Hirsch L. Messman had a conversation at the office of the defendant Dr. Hirsch L. Messman, 2396 Morris Avenue, Bronx, N. Y.

2. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, in or about the month of February, 1935, the defendant Morris Spitz signed two applications for life insurance policies with a certain insurance company, namely, The Maccabees.

3. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, during the month of December, 1934, the defendant Dr. Hirsch L. Messman administered to the defendant Benjamin Nelson pills containing digitalis or some derivative thereof.

4. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 19th day of December, 1934, the defendant Dr. Hirsch L. Messman and the defendant Benjamin Nelson had a conversation with the defendant Dr. Maximilain Goldstein at the office of the defendant Dr. Maximilain Goldstein, 829 Park Avenue, New York City.

5. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 19th day of December, 1934, the defendant Dr. Maximilian Goldstein took an electrocardiogram of the defendant Benjamin Nelson.

6. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 19th day of December, 1934, the defendants Benjamin Nelson and Dr. Hirsch L. Messman went to the Sydenham Hospital at 123rd Street and Manhattan Avenue, in the City and State of New York, where the defendant Benjamin [fol. 27] Nelson was admitted for hospitalization.

7. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about

the 22nd day of December, 1934, the defendant Dr. Maximilian Goldstein visited said defendant Benjamin Nelson at said hospital.

8. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, in or about the month of March, 1936, the defendants Benjamin Nelson, Martin Gross, Morris Spitz and Joseph J. Weiss had a conversation in the law offices of J. J. & A. L. Weiss, 276 Fifth Avenue, New York City.

9. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, in or about the month of September, 1936, the defendants Benjamin Nelson, Martin Gross, Morris Spitz and Dr. Hirsch L. Messman had a conversation on Broadway at approximately 77th Street, New York City.

10. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, in or about the month of December, 1936, the defendants Benjamin Nelson, Martin Gross, Morris Spitz and Joseph J. Weiss had a conversation at the law offices of J. J. & A. L. Weiss, 276 Fifth Avenue, New York City.

11. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 9th day of September, 1935, the defendant Benjamin Nelson signed a claimant's statement to the Equitable Life Assurance Society.

12. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 19th day of September, 1935, the defendant Dr. Hirsch L. Messman signed a physician's statement to the Equitable Life Assurance Society relating to the disability of the defendant Benjamin Nelson.

[fol. 28] 13. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 23rd day of September, 1935, the defendant Dr.

Maximilian Goldstein signed a physician's statement to the Equitable Life Assurance Society, relating to the disability of the defendant Benjamin Nelson.

14. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 18th day of December, 1936, the defendant Dr. Hirsch L. Messman signed a physician's statement to the Metropolitan Life Insurance Company relating to the disability of the defendant Benjamin Nelson.

15. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 18th day of April, 1937, the defendant Morris Spitz signed a claimant's statement to the Equitable Life Assurance Society.

16. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 13th day of April, 1937, the defendant Dr. George Krupp signed a physician's statement to the Equitable Life Assurance Society relating to the disability of the defendant Morris Spitz.

17. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 13th day of April, 1937, the defendant Dr. Hirsch L. Messman signed a physician's statement to the Equitable Life Assurance Society, relating to the disability of the defendant Morris Spitz.

18. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 16th day of January, 1937, the defendants Morris Spitz and Dr. Hirsch L. Messman went to the Park East Hospital at 112 East 83rd Street, New York City, where the defendant Morris Spitz was admitted for hospitalization.

[fol. 29] 19. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, in or about the month of December, 1936, the defendants Alfred L. Weiss, Joseph J. Weiss, Dr. Hirsch L. Messman, Ben-

jamin Nelson and Martin Gross had a conversation at the law offices of J. J. & A. L. Weiss, 276 Fifth Avenue, New York City.

20. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 25th day of December, 1936, the defendants Herman Berger and Dr. Hirsch L. Messman went to the Wadsworth Hospital, 629 West 185th Street, New York City, where the said defendant Herman Berger was admitted for hospitalization.

21. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, in or about the month of January, 1937, the defendants Alfred L. Weiss and Dr. Hirsch L. Messman had a conversation at the law offices of J. J. & A. L. Weiss, 276 Fifth Avenue, New York City.

22. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 12th day of March, 1937, the defendant Alfred L. Weiss had a telephone conversation with the defendant Herman Berger.

23. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 4th day of March, 1937, the defendants Dr. George Krupp and Morris Spitz had a conversation at the home of the defendant Morris Spitz, 1187 Anderson Avenue, New York City.

24. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 4th day of March, 1937, the defendant Dr. Hirsch L. [fols. 30-33] Messman spoke to the defendants Morris Spitz and Dr. George Krupp on the telephone.

25. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 4th day of March, 1937, the defendants Morris Spitz,

Dr. George Krupp, Dr. Hirsch L. Messman and Joseph J. Weiss had a conversation at the law offices of J. J. & A. L. Weiss, 276 Fifth Avenue, New York City.

26. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 25th day of March, 1937, the defendants Benjamin Nelson and Dr. Hirsch L. Messman had a conversation at the office of the defendant Dr. Hirsch L. Messman, 315 Central Park West, New York City.

27. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 25th day of March, 1937, the defendant Dr. Hirsch L. Messman spoke on the telephone to the defendant Joseph J. Weiss.

28. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, in or about the month of January, 1937, the defendants Joseph J. Weiss, Dr. Hirsch L. Messman, Martin Gross, Benjamin Nelson and Dr. George Krupp had a conversation at the law offices of J. J. & A. L. Weiss, 276 Fifth Avenue, New York City.

Against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 88, Title 18, U. S. C.)

Lamar Hardy, United States Attorney.

[fol. 34] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

vs.

JOSEPH J. WEISS, ALFRED L. WEISS, MARTIN GROSS, DR. HIRSCH L. MESSMAN, Dr. Maximilian Goldstein, Dr. George Krupp, Benjamin Nelson, Herman Berger and Morris Spitz

Violation of using the mails in a scheme to defraud and conspiracy so to do.

Section 88, 338, Title 18 U. S. C.

DOCKET ENTRIES

7/30/37 Filed indictment.
8/ 2/37 Docketed discharge as to Hirsch Messman dated May 22, 1937, filed May 26th, 1937.
8/12/37 Filed notice of appearance for Dr. Krupp by A. Males and S. Schwartz, attorneys.
Filed notice of appearance for Dr. Maximilian Goldstein by Schwartz & Frohlich, attorneys.
8/17/37 Joseph J. Weiss pleads not guilty. Bail continued.
Alfred L. Weiss pleads not guilty. Bail continued.
Martin Gross pleads not guilty. Bail continued.
Dr. George Krupp pleads not guilty. Bail continued.
Benjamin Nelson pleads guilty.
Herman Berger pleads guilty.
Morris Spitz pleads guilty.
Sentence adjourned to September 17th, 1937; bail continued as to defendants Berger and Spitz; defendant Nelson paroled. Hulbert, J.
8/20/37 Maximilian Goldstein pleads not guilty. Bail $1500 to cover C 100/452-454-463 and 456.
[fol. 35] Paroled to 4 P. M. to give bail. Hulbert, J.
Filed recognizance for Maximilian Goldstein $1500 to cover C 100/452-454-456 and 463. Continental Casualty Co. surety.

Docket Entries—Continued

8/24/37 Filed petition and notice of motion to return and suppress seized property of defendant Martin Gross.
Filed affidavit in opposition to motion.

8/24/37 Filed opinion of Hulbert, J. #10845. Motion denied.

8/26/37 Herman Berger bail reduced to $100 on motion of Government. Hulbert, J.

8/31/37 Filed recognizance for Herman Berger $100 cash.

9/13/37 Filed affidavit and notice of motion for a bill of particulars as to defendant Dr. George Krupp. Memo endorsed. Motion argued. Motion denied. Kennedy, J.

9/18/37 Filed order denying motion for bill of particulars as to Dr. George Krupp. Kennedy, J.

11/ 4/37 Docketed M. Gross bond filed 8/11/37.
" M. Spitz bond filed 8/11/37.
" J. J. Weiss bond filed 8/11/37.
" A. L. Weiss bond filed 8/11/37.
" B. Nelson bond filed 8/11/37.
" H. Berger bond filed 8/11/37.

11/18/37 Docketed G. Krupp bond filed 8/11/37.

11/29/37 Filed affidavit and order to show cause for an order granting re-argument of application of Martin Gross for return of papers and records seized. Memo endorsed dated December 6th, 1937. Motion for re-argument granted and petition denied. See opinion etc. Hulbert, J.
Filed affidavit of Frank E. Shea in opposition to motion.

[fol. 36] Filed opinion #11040 granting motion of Martin Gross for re-argument and denying prayer of petitioner. Hulbert, J.

1/ 6/38 The Government moves to sever as to H. L. Messman, B. Nelson, H. Berger and M. Spitz. No opposition. Motion granted. Trial begins as to the remaining defendants before Patterson, J.

1/ 7/38 Trial continued.

1/10/38 Trial continued.

Docket Entries—Continued

1/11/38 Trial continued.

Filed and entered order denying motion for return of papers and suppression of evidence as to M. Gross. Hulbert, J.

1/12/38 Trial continued.
1/13/38 Trial continued.
1/14/38 Trial continued.
1/17/38 Trial continued.
1/18/38 Trial continued.
1/19/38 Trial continued.
1/20/38 Trial continued.
1/21/38 Trial continued.
1/24/38 Trial continued.
1/25/38 Trial continued.
1/26/38 Trial continued.
1/27/38 Trial continued.
1/28/38 Trial continued.
1/31/38 Trial continued.
2/ 2/38 Trial continued.
2/ 3/38 Trial continued.
2/ 4/38 Trial continued.
2/ 7/38 Trial continued.
2/ 8/38 Trial continued.

[fol. 37]

2/ 9/38 Trial continued.
2/10/38 Trial continued.
2/11/38 Trial continued.
2/14/38 Trial continued.

Government moves to dismiss counts 8 and 12 as to all defendants. Motion granted. Government rests. Counsel for A. L. Weiss and J. J. Weiss moves to dismiss the indictment and each of the remaining counts in the indictment. Decision reserved. Counsel for defendants M. Gross and G. Krupp make the same motions. Decision reserved. Counsel for Dr. Goldstein moves to dismiss the indictment and each count of the remaining counts except count 20. Decision reserved.

Docket Entries—Continued

2/15/38 On behalf of Dr. Krupp the court grants the motion to dismiss counts 9-10-11 and 13. All other motions as to all defendants denied. Exc. Trial continued.

2/16/38 Trial continued.

2/17/38 Trial continued.

2/18/38 Trial continued.

2/21/38 Alfred L. Weiss being ill the court is adjourned to February 23rd, 1938.
Filed order to have physician examine A. L. Weiss. Patterson, J.

2/23/38 Government moves to sever as to A. L. Weiss and to declare a mistrial as to A. L. Weiss. Motion granted. Trial continued as to the remaining defendants.

2/24/38 Trial continued.

2/25/38 Trial continued.

2/28/38 Trial continued.

3/ 1/38 Trial continued. Both sides rest. All defendants move for a dismissal of the indictment on each count thereof and for a directed ver-
[fol. 38] dict of acquittal. Denied exception. Mr. Kiendl on behalf of Dr. Goldstein sums up.

3 /2/38 Trial continued. Mr. S. Schwartz, Mr. Friedman, Mr. Stryker sums up for their clients. The Government sums up.

3/ 3/38 Government sums up. Court charges. Jury retires. Partial verdict returned. J. J. Weiss guilty as charged. Martin Gross guilty as charged. Jury polled. Jury retires for further deliberation. Bails as to Weiss and Gross continued until March 4, 1938. Jury retires for night.

3/ 4/38 Verdict—Dr. Goldstein guilty as charged. Dr. Krupp guilty as charged. Defendants move to set aside verdict. Denied exception. Sentences adjourned until March 7th, 1938. Bails continued. Patterson, J.

Docket Entries—Continued

3/ 7/38 Filed judgment—Martin Gross 3 years on each of counts 1-2-3-4-5-6-7-9-10-11-13-14-15-16-17-18-19. 2 years on count 20. All sentences to run concurrently and to be served at a penitentiary to be designated by Attorney-General. Bail continued pending appeal.

Filed judgment—Joseph J. Weiss 3 years on each of counts 1-2-3-4-5-6-7-9-10-11-13-14-15-16-17-18-19. 2 years on count 20. All sentences to run concurrently and to be served at a penitentiary to be designated by the Attorney-General. Bail continued.

3/ 7/38 Filed judgment—Maximilian Goldstein 1 year and 1 day on each of counts 1-2-3-4-5-6-7-9-10-11-13-14-15-16-17-18-19-20. All sentences to run concurrently and to be served at a penitentiary to be designated by the Attorney-General. Bail continued pending appeal.

Filed judgment—George Krupp 1 year and 1
[fol. 39] day of each of counts 1-2-3-4-5-6-7-14-15-16-17-18-19-20. All sentences to run concurrently and to be served at a penitentiary to be designated by the Attorney-General. Bail continued pending appeal.

Filed judgment—Herman Berger 2 years on each of counts 1 to 20 inclusive. Sentences to run concurrently. Execution of sentences suspended. Defendant placed on probation for a period of 2 years subject to the standing probation order of this court.

Filed judgment—Morris Spitz 2 years on each of counts 1 to 20 inclusive. Sentences to run concurrently. Execution of sentences suspended. Defendant placed on probation for a period of 2 years subject to the standing probation order of this court. Patterson, J. Issued commitments in triplicate.

3/ 8/38 Defendants Joseph J. Weiss and Maximilian Goldstein paroled in their own recognizance pending appeal. Patterson, J.

Docket Entries—Continued

3/ 9/38 Bail fixed at $1500 as to Dr. George Krupp pending appeal. Paroled to give bail. Old bail ordered discharged upon filing bond of $1500. Patterson, J.

3/11/38 Filed notice of appeal as of Joseph J. Weiss.
Filed notice of appeal as of Dr. George Krupp.
Filed notice of appeal as of Maximilian Goldstein.
Filed notice of appeal as of Martin Gross.
Notices sent to Judge Patterson.

3/12/38 Filed bond pending appeal of Dr. George Krupp $1500. National Surety Corporation.

3/15/38 Filed order extending time to file bill of exceptions to and including October 1st, 1938, as to Joseph J. Weiss, Martin Gross, Maximilian Goldstein and George Krupp. Patterson, J.

[fols. 40-64]

5/17/38 Martin Gross bail reduced to $7500 on motion of Mr. Kaufman, Assistant U. S. Attorney. Clancy, J.

8/29/38 Filed recognizance $2000 U. S. F. & G. Co. filed July 18, 1938 for A. L. Weiss.
Bond pending bail $7500 National Surety Co. Filed July 18, 1938 for Martin Gross.

[fols. 65-111] In United States District Court, Southern District of New York

C 100-451

United States of America

v.

Joseph J. Weiss, Alfred L. Weiss, Martin Gross, Dr. Hirsch L. Messman, Dr. Maximilian Goldstein, Dr. George Krupp, Benjamin Nelson, Herman Berger and Morris Spitz, Defendants

Bill of Exceptions

Before: Hon. Robert P. Patterson, District Judge and a Jury.

New York, January 6th, 1938, 10:30 A. M.

Appearances:

Lamar Hardy, Esq., United States Attorney, for the Government; Lamar Hardy, Esq., United States Attorney, John F. Dailey, Jr., Esq., Assistant United States Attorney, Irving R. Kaufman, Esq., Assistant United States Attorney, Robert L. Werner, Esq., Special Assistant to United States Attorney, of Counsel.

Lloyd Paul Stryker, Esq., Attorney for Defendants Joseph J. Weiss and Alfred L. Weiss.

Arthur Schwartz, Esq., Attorney for Defendant Dr. Maximilian Goldstein; Theodore Kiendl, Esq., Edward C. McLean, Esq., and John Polk, Esq., of Counsel.

Jacob W. Friedman, Esq., Attorney for Defendant Martin Gross.

Abraham Males, Esq., Attorney for Defendant Dr. George Krupp; Sylvan Schwartz, Esq., of Counsel.

[fols. 112-214] Benjamin Nelson, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Kaufman:

I have been indicted with the eight other defendants and have pleaded guilty.

[fol. 215] Mr. Kaufman: I ask that this be marked for identification.

(Marked Government's Exhibit 110 for identification.)

Q. Mr. Nelson, I show you Government's Exhibit 110 for identification and I ask you whether the date appearing on the top would refresh your recollection as to approximately the date when you had that discussion about the check with Mr. Weiss. Will you please read that?

A. Yes, sir I remember this conversation. That that date I believe I was waiting for the check to come in Mr. Weiss' office——

Mr. Stryker: Pardon me. May we have the time fixed?

The Witness: It is March 11th, 1937.

A. (Continued.) And I was in Mr. Weiss' office quite late and the check did not come in. When I got hime Mrs. Nelson told me that Dr. Messman's office had called that I should call him back; and I called Dr. Messman's office, and this conversation took place between Mrs. Messman and myself.

Q. Mr. Nelson, do your initials appear on the bottom of Government's Exhibit 110 for Identification?

A. Yes, sir.

Q. And on the second sheet of Exhibit 110?

A. Yes, sir.

Q. Did you hear, Mr. Nelson, a conversation on that record between you and Mrs. Messman played to you?

A. I did——

Mr. Stryker: I object on the ground it is incompetent, Irrelevant and immaterial and upon the further ground that it is an effort to bolster this witness by a memorandum not in evidence. Upon the additional ground that the offer now made to elicit this testimony is in violation of the Fourth and Fifth Amendments of the Constitution of the United States, and upon the further ground that before any record could be admissible we should have the right to cross-[fol. 216] examine the person making the record. On the further ground that there is no evidence which would justify the introduction of this proof. The only analogy to it that I know of would be the memorandum rule, and in order to introduce a memorandum in evidence the witness must first testify that he has no recollection whatever of the transaction on the memorandum.

Now this witness has already said that he remembers having a conversation. I object on the further ground that the evidence sought to be elicited by this question is in violation of Section 605 of the Federal Communications act as construed by the Nardone case recently decided by the Supreme Court of the United States, in which case I submit the effects and rationale of the decision of the Supreme Court was to sustain the minority view on this subject, as expressed in the Olmstead case, in which case the minority speaking through Mr. Justice Holmes described this type of evidence as "dirty business".

Furthermore I object to the attempted introduction of this evidence, that without the opportunity to cross-examine the persons making or alleged to have made this record to determine whether or not there was a trespass and an invasion of the defendant's house or his property, and that under no circumstances in such event would the evidence be admissible, and I call your Honor's attention to the fact that in the Olmstead case the Court particularly commented upon the fact that there was no proof that the record there introduced has been made by means of trespass on the defendant's property. I would say from a reading of that case that that was perhaps the essential point in the case.

The Court: What is the question?

Mr. Stryker: I object finally upon this ground, your Honor: That under section 1423 of subdivision 6 of the Penal Law of the State of New York the tapping of a telephone wire is a felony; and I submit that I must have the opportunity in this case to determine who committed any felonies in this case, because as I have made plain in my opening, it is my definite theory that this witness, throughout this case, has been committing perjury, and, I think [fol. 217] suborned perjury——

Mr, Kaufman: Oh, now, please——

The Court: What has that to do with this objection?

Mr. Kaufman: That is what I would like to know.

Mr. Stryker: Because I have a right to determine who was concerned in any conspiracy to violate any penal statute —a part of which conspiracy I submit this case is. Those are the grounds of my objection.

The Court: Now, read the question.

(Question read as follows):

"Did you hear, Mr. Nelson, a conversation on a record between you and Mrs. Messman played to you?"

The Court: Objection overruled.

Mr. Stryker: Exception.

Q. Did you?

A. I did.

Q. And when you were listening to that record, were you following the conversation with a transcript before you?

A. I did.

Q. And if there was any correction to be made, did you make such correction?

A. I did.

Q. And upon the completion of your listening to that record of your conversation, did you initial that transcript?

A. I did.

Q. And the record also?

A. Yes, sir.

Q. And the initials appearing on the bottom of this transcript indicate that this was a true and accurate transcription of your conversation with Mrs. Messman?

A. Yes, sir.

Q. Did you recognize the voice of Mrs. Messman?

A. I did.

Q. And do you remember whether that telephone call was made from a point within the City of New York, to Dr. Messman's office?

A. This call was made from my house to Dr. Messman's office.

Q. What was Dr. Messman's telephone number? Was it Schuyler 4-2277?

[fol. 218] A. Yes, sir.

Q. And what was your telephone number?

A. Tremont 8-8668.

Mr. Kaufman: At this time I would like to offer in evidence the transcript of that conversation.

The Court: Can you tell us from your memory alone exactly what you said on the telephone to Mrs. Messman in the course of that talk, without looking at any paper? Can you tell us the very words that you used and the very words that she used?

The Witness: I could possibly do it in some way——

Mr. Kaufman: No.

The Court: I say, could you tell us the very precise words that you spoke and that Mrs. Messman, Spoke, word for word, without looking at any paper, and purely from your memory?

The Witness: I couldn't possibly say it word for word, but I could give the substance of the conversation.

The Court: All right. You could give the substance of the conversation, but you could not give the thing word for word?

The Witness: No, your Honor.

The Court: Of course he could not. By refreshing your memory from a paper, could you say whether or not those words are the very words that you used——

The Witness: Yes, sir, your Honor.

The Court: And the very words that she used?

The Witness: Yes, your Honor.

The Court: There is not evidence here that any wires were tapped. I do not know how this paper came into existence.

Mr. Stryker: I do not yet myself, of course. I do not yet myself, of course.

The Court: I have read that Nardone case, and have discussed it with counsel. Even if there were proof in this [fol. 219] case that wires were tapped. I have the opinion that Section 605 of the Federal Communications act, as construed by the Supreme Court in the Nardone case, touches only interstate communication, and does not touch the case of a telephone wire tapped in calls that are strictly within the State.

Mr. Stryker: Just so that my position may be clear on the record——

The Court: However, I think we are getting ahead of ourselves, because there is no proof here as to how either the record was made or how the transcript that has been mentioned came into existence.

Mr. Stryker: That is true, and I may be slightly premature; but I would like to state my position with reference to this case, I submit that——

The Court: I think I understood your attitude a few minutes ago, when you stated your position, and mentioned that case as one of the grounds of your objection.

Mr. Stryker: Perhaps I did make it plain, but one thing I think I did not make clear.

The Court: Of course, it was perfectly admissible evidence prior to the passage of that statute in 1934.

Mr. Stryker: Yes, in a federal court, but I want to have before the court——

Mr. Kaufman: May I suggest, before Mr. Stryker proceeds, that if there is going to be protracted argument, the jury should be excused.

Mr. Stryker: No, I only want to make sure that I have stated my grounds fully; and one thing which I think I did not say is that it is my judgment, and I respectfully submit it to the court, that the Supreme Court of the United States decided unquestionably both in the Olmstead case and in the Nardone case that congress had the power to determine by statute what evidence was admissible and what evidence was not admissible in its federal courts, irrespective of its interstate constitutional powers.

The Court: I will not take issue with you on that.

Mr. Stryker: And that the Court, through Judge Roberts, [fol. 220] decided that evidence gained in that way was not admissible in the federal courts, as he construed the second paragraph, I think of section 605 of the Communications Act. I do not wish to argue it further now, but I just want that on record. But apart from that, and going back now to the common law principles of evidence, I understand the rule to be that an independent memorandum is only admissible in the event that a witness has no independent recollection whatever of the fact. In other words, if this witness, for example, were shown a paper or perhaps a statement by him, and he were asked whether he remember that, and he said "No", that he had no independent recollection whatever of the facts or the substance of it, in such a case the memorandum would be admissible; but in your Honor's questions you asked him whether he could state verbatim what was in it. Now, I respectfully submit to the court that the rule is not whether he can state verbatim, but whether he knows the substance of the conversation; and if I have heard aright, this witness has said that he does know the substance of it; and if that is so, then under the common law principle of evidence, I submit that the memorandum itself is not, in and of itself, admissible.

Mr. Kaufman: May I state further for the record, Your Honor, that——

Mr. Stryker: Just one thing more; I forgot to state, and I want to call the Court's attention to the fact that this witness not only has testified that he knew the substance of the conversation, but that his knowledge of it was so perfect that he could sit there with a pencil and correct the exact words of this transcript.

Mr. Kaufman: Oh, no, that is not what he testified to.

Mr. Stryker: Well, that is as I understood it.

Mr. Kaufman: No. He testified that there was a record made, and that he had a copy of the transcript before him, and that if the transcript was not correct, according to the record, he made his corrections of the transcript; but that the record, in the last analysis, was a true and accurate recording.

Mr. Stryker: I may be in error about that.

[fol. 221] The Court: Do you intend to introduce the record?

Mr. Kaufman: Not for this particular conversation, your Honor, no.

The Court: There may be something to your point on the admissibility of it on common law grounds.

Mr. Stryker: I think there is.

The Court: In view of the fact that the witness has said he could give the substance of it. However, it seems to me that it would be analogous to this: Suppose a witness said, as to an amount, "I think it was about $30," and then by showing him a piece of paper, he could say definitely that it was $30.19; I should think the piece of paper would be all right.

Mr. Stryker: It would be to refresh his recollection, but not the paper itself. As I understand the principle of evidence, a witness may refresh his recollection from anything. I think some cases have said he may refresh his recollection from a newspaper—if you like.

The Court: Oh, yes.

Mr. Stryker: Or a load of hay, or anything at all. But that does not make the newspaper or the load of hay or a signpost admissible.

Mr. Kaufman: Your Honor will recall that I had shown the witness this transcript, and after I had shown him this transcript, he was able to remember the substance of the conversation; but he had no independent recollection of this conversation with Mrs. Messman before I had shown him the transcript.

The Court: I think the point is a fair one—that he may give his recollection of the conversation, with his memory refreshed by that paper, but that does not make the paper in and of itself an independent piece of evidence.

Mr. Kaufman: May I question the witness further on that?

The Court: Yes.

Q. Mr. Nelson, you testified that you had a conversation with Mrs. Messman on or about March 11; is that correct?

A. Yes, sir.

Q. And you further testified that you would not remem-[fol. 222] ber verbatim your conversation with Mrs. Messman, and by "verbatim" I mean word for word.

A. I wouldn't.

Q. Now, subsequently and in this building there was played to you a record which contained your voice and Mrs. Messman's voice; is that so?

A. Yes, sir.

Mr. Stryker: If your Honor please, it seems to me that this is just another way of trying to introduce evidence that is not admissible. The sole question at present, as I understand, is that your Honor is passing now on a purely old fashioned common law principle of evidence. On the other point, I take it——

The Court: I have overruled the other point.

Mr. Stryker: Yes; that was because the conversation does not purport to be with the defendant; but we are now concerned with a simple question of a common law principle or rule of evidence as to whether or not an independent paper is admissible, in the face of testimony that the witness remembers the substance of the conversation.

The Court: Do you want to ask some more preliminary questions?

Mr. Kaufman: Yes.

The Court: All right.

Mr. Kaufman: It is our contention that as corroboration of what the witness has said——.

Mr. Stryker: May I ask that this man be out of the court room while this discussion is going on?

The Court: You mean the witness on the stand?

Mr. Stryker: Yes.

The Court: Oh, no.

Mr. Stryker: Sometimes one listening to argument——

The Court: This discussion will not last much longer on this. I think it has been pretty nearly exhausted.

Mr. Kaufman: It is our contention that this was inde-[fol. 223] pendent corroboration of this witness' statement that Mr. Weiss had told him a check would be forthcoming on a particular date in the sum of $2250——

Mr. Stryker: Again, you see, your Honor——

Mr. Kaufman: I refrained from interrupting Mr. Stryker when he was making his beautiful speech about wiretapping, and I submit that I now have a right to state my——

Mr. Stryker: All right. I will not interrupt you further.

Mr. Kaufman: As I was saying, it is our contention that that is independent corroboration of Mr. Nelson's statement that Mr. Weiss had told him that a check would be forthcoming. You will recall he stated he did not remember the date.

The Court: It is a paper, as a understand it, which the witness said he compared to a phonograph record that was played for him.

Mr. Kaufman: That is right.

The Court: And he said that it is exactly, as I understood him, what he and Mrs. Messman said over the wire.

Mr. Kaufman: Yes.

The Court: Now, he may read that, if you like, with his memory refreshed word for word—he may read it aloud, and that will be his testimony as to what was said when he talked with Mrs. Messman on the telephone; but I do not see how I can take it in independently, until you get before me on the witness stand someone who can identify the phonographic record.

Mr. Kaufman: As a record that was taken on that particular day?

The Court: Yes.

Mr. Kaufman: I will accept your Honor's ruling, and will ask the witness this:

Q. Mr. Nelson, after looking at Government's Exhibit No. 110 for identification, can you tell us word for word what you said to Mrs. Messman on that day (handing)?

[fol. 224] Mr. Stryker: If your Honor please, prior to the answer to that question, may I have a brief preliminary cross examination on that subject of this witness?

The Court: As to how his memory is refreshed?

Mr. Stryker: Yes, and whether it needs to be refreshed.

The Court: Yes.

Preliminary Cross Examination.

By Mr. Stryker:

The Court: That is on the voir dire pure and simple?

Mr. Stryker: Yes, your Honor; simply with respect to the question just asked.

The Court: All right.

Q. You remember, do you, Mr. Nelson, this conversation that you had with Mrs. Messman?

A. I remember it after listening to the phonograph record, and after I have read Government's Exhibit.

Q. Did you remember the conversation before you heard that record?

A. I did not.

Q. You remembered that you had a conversation?

A. I remembered I had many conversations with the office of Dr. Messman or Mrs. Messman.

Q. Well, you remember, do you not, the substance of all these conversations to which you have been testifying now for some days?

Mr. Kaufman: That is objected to. He has not testified at all about the substance of any telephone conversation with Mrs. Messman.

Mr. Stryker: That was not my question. I will withdraw it.

Q. You have been testifying here for several days about conversations that you say you had with Mr. Weiss?

A. Yes.

Q. And with Mr. Gross and others?

A. Yes.

Q. Now, you remember those conversations, do you?

A. In a way.

Q. I mean what you have sworn to under oath as having been said by Mr. Weiss and the others, you remembered that yourself before you got down to the district attorney's [fol. 225] office, did you not?

A. I haven't remembered all the conversations.

Q. Well, did you remember those that you have testified to here today?

Mr. Kaufman: I object to this, your Honor.

The Court: Yes, I think you had better confine it to this particular talk.

Mr. Stryker: All right.

The Court: This is all preliminary.

Mr. Stryker: Yes, I will adopt your Honor's suggestion.

Q. You remember that you had a talk with Mrs. Messman on this day, do you?

A. On the day when I was in Mr. Weiss' office waiting?

Q. On the day——

A. Waiting for the Maccabees check, and when I got home——

Q. No. My question is do you remember having a conversation with Mrs. Messman on the telephone on the day indicated in that memorandum?

A. Yes, sir.

Q. All right. Now, do you remember the substance of that conversation?

A. I do now.

The Court: In a general way?

The Witness: Yes.

Mr. Stryker: Yes, in a general way.

Q. Do you remember the subject matter of that talk?

A. Yes.

Q. That is, what you talked about—you remember that?

A. Yes, sir.

Q. That is, you remember what she talked about and what you talked about?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. You have a clear recollection of that, have you not?

A. Fairly clear. Yes.

Q. And you had, did you, a recollection of what you talked about before you ever got down to the district attorney's office, and spent the time that you have told us you spent there?

Mr. Kaufman: I object to that, your Honor.

The Court: Overruled.

[fol. 226] Q. Did you?

A. Did I remember what?

Q. I say, you had a recollection——

The Court: He means that all along you had a general recollection of what you talked about with Mrs. Messman, ever since you had that talk.

Mr. Stryker: Yes.

Q. The Judge's question is clear to you, is it?

A. Yes; that I remember.

Q. So you had that memory right along before you went into the district attorney's office and after?

A. Not until my memory was refreshed, no.

Q. No. Listen. I am not talking about the exact words or the questions and answers as written out there; but you remembered the substance of what you talked about and what she talked about long before the days when you began to spend your time in the district attorney's office?

A. Mr. Stryker, I had so many conversations during that period of several years, that if I committed myself to tell you that I now remember this conversation between me and Mrs. Messman, I don't believe I would be telling the truth about it.

Q. Well, do you remember, or did you remember at all times the substance of that talk?

A. Yes.

Q. That is, the subject matter that you talked about?

A. Yes.

Q. And you remembered that before you ever saw that paper, did you not?

A. I did.

Q. All right. Now, what was the date of that conversation, Mr. Nelson?

A. According to this record here, it is dated March 11th.

Q. Of what year?

A. 1937.

Q. Now, that conversation was long after the many other conversations that you have testified that you had with the Weisses, was it not?

A. Yes, sir.

Q. All right. Now, you can tell us now, can you not, without looking at that paper at all, the subject that you talked about, and in general way without the exact words at all what Mrs. Messman said to you and what you said to her? You can do that, can you not?

[fol. 227] Mr. Kaufman: If your Honor, please——

The Court: He has said he could, in a general way.

Mr. Stryker: Yes, that is all.

Direct Examination (Resumed).

By Mr. Kaufman:

Q. I now ask you to look at Government's Exhibit 110 for identification, Mr. Nelson, and refreshing your recol-

lection from that, tell us exactly what you said to Mrs. Messman and what Mrs. Messman said to you?

Mr. Stryker: I object. The question is improper until the witness states that he can not give the substance without refreshing his recollection from the paper.

The Court: He said he could give the substance, but he could not give the precise language; but he says that by looking at the paper he can give the precise language; and the precise language, if he can give it, is better than the substance. I will take it. Objection overruled.

Mr. Stryker: Exception.

Q. I want the precise language of your conversation with Mrs. Messman. I want to know what you said to her and what she said to you. Read it to the jury.

The Court: Yes, read it aloud.

Mr. Stryker: He might as well introduce the paper, as to do that. My understanding is—and your Honor will correct me if I am wrong—that the witness can pick up a paper and refresh his recollection, and then testify; and if he can not refresh his recollection at all, the paper itself is evidence; but to sit there and read that paper I submit is just the same as putting it in.

The Court: Read the paper. You may read it aloud.

Mr. Stryker: Exception.

Mr. Kaufman then asked the witness to read from the paper. He read as follows:

"Mrs. Messman: Dr. Messman's office."

"Benjamin Nelson: Hello, Mrs. Messman how are you?"

[fol. 228] "Mrs. Messman: Fine; how are you, Mr. Nelson?

"Benjamin Nelson: All right, thanks."

"Mrs. Messman: Listen, you're going to meet the doctor somewhere?

"Benjamin Nelson: Is the doctor home now?

"Mrs. Messman: Yeah.

"Benjamin Nelson: Can I speak to him, please?

"Mrs. Messman: Well, just a minute, please.

"Benjamin Nelson: Yeah.

"Mrs. Messman: He's listen, he's supposed to meet you somewhere——

"Benjamin Nelson: Yeah, well I'll make up where.

"Mrs. Messman: By, by Merchin?

The Witness: Yes. (Continuing reading):

"Benjamin Nelson: What time?

"Mrs. Messman: He'll start out in a half hour.

"Benjamin Nelson: He'll start in half an hour?

"Mrs. Messman: Yeah, in about three quarters of an hour meet him; He's eating now.

"Benjamin Nelson: uhhuh—he, he's eating now?

"Mrs. Messman: Yeah.

"Benjamin Nelson: I see. Ask him what he's got, what kind of a check he got for me?

"Mrs. Messman: Huh?

Mr. Stryker: Is that "huh" or what is it?

The Court: Do you wish to have it repeated?

Mr. Stryker: Yes.

The Court: Start over again with "huh."

The Witness: All right.

Mr. Kaufman: If you are attempting to humiliate the witness——

Mr. Stryker: Oh, No. I couldn't humiliate this witness. [fols. 229-269] Mr. Kaufman: I object to that, your Honor.

The Court: Go ahead.

The Witness: (Continuing reading)

"Mrs. Messman: Huh?

"Benjamin Nelson: He said, he called up, he's got a check for me, what kind of a check is it?

"Mrs. Messman: A very, very big one.

"Benjamin Nelson: What, $2200?

"Mrs. Messman: Yeah.

"Benjamin Nelson: Oh, then it must have come in after I left the office.

"Mrs. Messman: Yeah, yeah.

"Benjamin Nelson: Oh.

"Mrs. Messman: So wait for him, meet him there.

"Benjamin Nelson: All right.

"Mrs. Messman: In about three quarters——

"Benjamin Nelson: Yeah.

"Mrs. Messman: So long.

"Benjamin Nelson: Listen, hello——

"Mrs. Messman: Hello.

"Benjamin Nelson: Hello—tell him not to say nothing in Merchin's about it.

"Mrs. Messman: O. K.

"Benjamin Nelson: All right.

"Mrs. Messman: Yeah."

[fol. 270] Mr. Kaufman: Your Honor, at this point I am going to renew my offer of these records and conversations.

The Court: What do you mean records?

Mr. Kaufman: Recordings of conversations which Nelson had with other parties.

The Court: You never offered them before. It is not a renewed offer.

Mr. Kaufman: I offered a record yesterday, and I believe Mr. Stryker objected to——

The Court: No offer was made to offer a record. You made an offer of a transcript.

Mr. Kaufman: That is right, your Honor.

The Court: And that was read by the witness.

Mr. Kaufman: Well, at this point, Judge, I would like to offer in evidence not only a transcript but a record, a recording of a conversation which this witness had with a defendant in this case.

The Court: Speaking of a phonograph record?

Mr. Kaufman: A phono-graphic record.

The Court: Is that the same talk?

Mr. Kaufman: It is another talk. This is a talk which the witness had on or about January 9th, 1937. It is a talk he had with Dr. Messman.

Mr. Stryker: Have you finished your offer, Mr. Kaufman?

Mr. Kaufman: Yes, sir.

Mr. Stryker: I object to it, your Honor upon the ground stated by me yesterday, and upon the further ground, that in no event, no matter how your Honor may rule with respect to the communications act or the Nardone case, would any record be admissible, except through the testimony of the person who made it. I can not cross-Examine a physical disc.

The Court: I will make my position clear on an offer of [fol. 271] this sort; a phonograph record of a telephone conversation if properly identified between this witness and Messman, taken on a local call and not on an interstate call, is perfectly admissible, in my opinion. It has been declared in the Supreme Court to be competent evidence over objection that was taken. The recent decision in the Nardone case only applies to interstate calls. That is based upon a provision of the Federal Communications Act. That Act has specially to do only with interstate or foreign communications. The statute in no way reads to the effect that intercepted communication shall not be received in evidence in

a United States Court. Congress has not decided that. Moreover the tender made by Mr. Kaufman here is not a conversation, as I understand it, participated in by any defendant now on trial.

Mr. Stryker: I don't know whom it is with.

The Court: You would have the question raised in the Nardone case if the United States had offered an intercepted communication by a defendant now on trial, or someone else, and also if it were an interstate call. I think the only point involved in the offer here is one of identity. That is the only point I can see.

Mr. Stryker: May I understand the point?

The Court: In pursuance to the old case that was in the Supreme Court some years ago, it is perfectly commonplace in this court to take evidence of communications by telephone obtained by wire. I myself in many cases know that such testimony has been received. The only new feature was the decision furnished by the decision of the Supreme Court last month, and as I explained to you, and as I read the decisions the decisions construe it only applies to interstate communications and only communications where one of the defendants on trial is said to have participated in.

Mr. Stryker: I appreciate Your Honor's ruling.

The Court: Invariably the evidence is introduced by putting a man on the witness stand who took the record and ran the machine, or whatever it is.

Mr. Stryker: That is it, your Honor.

[fol. 272] The Court: That is true. That is the only thing that I am at all in doubt about with respect to the tender of proof which Mr. Kaufman said he is about to make.

Mr. Stryker: I have your Honor's ruling with respect to the construction of the Nardone case and I shall not pursue that further.

The Court: Well, save your exception.

Mr. Stryker: I except of course, your Honor, I shall not pursue that argument. I have tried to make myself clear, and that is the end of that. Certainly I am sure your Honor will agree with me that no mechanical device of this kind is admissible unless on the testimony of the man who said he took it.

The Court: It must be identified some way.

Mr. Kaufman: I disagree with Mr. Stryker's analogy. This situation is a situation where for example we were on a sound truck and Mr. Nelson and Mr. Weiss was walking

down the street and wer were taking a picture of him and the sound voice was recorded, what they were saying. Does Mr. Stryker mean to contend that we play the picture and sound played back with it? The witness could not say that is what happened that day, but that is me walking down the street, and that is what I said and what he said.

Mr. Stryker: I can not follow the analogy. Therefore, I won't try to debate that.

The Court: It is now the noon hour. I will excuse the jury until 2 o'Clock. We will continue this for a few moments after the jury leaves.

(At this point the jury retired from the court room and the proceedings continued as follows in the absence of the jury):

Mr. Stryker: May we have the witness off the stand, your Honor?

The Court: Yes (to the Witness) You come back at 2 o'Clock. (The witness, Mr. Nelson, left the court room.)

The Court: What is the procedure to be?

[fol. 273] Mr. Kaufman: I will show the witness a record.

The Court: Show it to him—you mean a disc?

Mr. Kaufman: Yes, your Honor. On that disc appears the initial and the date next to it. That indicates that he heard this record played back to him on that date. Also on a transcript appear his initials and a date. The transcript is a transcript of the record. The witness will so testify. The witness will further testify that the voice he hears he can identify, the conversations is his, he had it on the telephone on a particular date, and what is recorded on the record is exactly what he said, and what the other party said on that particular date.

As I said before, analagous to this situation is that we will take a moving picture. Now a moving picture is a reflection of a light wave. This is a reflection of sound. It is a recording of sound by a needle. Surely Mr. Stryker could not contend that if I brought in that moving picture in this court room, it was taken last December, and this witness says, "Yes, that is my picture; I remember that. I remember I was doing that when that picture was taken" would not be admissible?

The Court: Do you know whether he was unconscious of the fact the picture was being taken?

Mr. Kaufman: Yes, your Honor.

The Court: You may be right about that. I am not saying I agree with you.

Mr. Stryker: If your Honor please, I am glad you dismissed the jury, because I can talk freely. I am talking to none other than the court. Now let me make myself perfectly plain about this. Here are these discs, they were made by somebody at some time. Now just as in moving pictures and even a person who acts the moving pictures or witnesses them, I think that we all know how moving pictures can be faked and put together, and we have all kinds of scenes of what took place in a pond in Hollywood, and to me, I think [fol. 274] I have seen a wonderful story from which I get a thrill.

Now with regard to these discs I assume that modern science is quite competent to apply various tricks with records in the same way it does with moving pictures, and I want to say to your Honor what I would not have felt privileged to say in the presence of the jury that frankly it is my opinion and my definite conviction that we are dealing here with a witness who would say anything.

Mr. Kaufman: This is the best evidence——

Mr. Stryker: Yes, that is right, but please let me finish.

Mr. Kaufman: I am sorry.

Mr. Stryker: Now that is the type of gentlemen we have here. For five days I have listened to his story which, if true, makes him one of the most abondoned rascals we have ever seen, a man now living far more luxuriously than I did for many years after I came to New York.

The Court: Pass that.

Mr. Stryker: I will let that pass.

Here is a record. Here is something on a disc like a phonograph record. Now I want to know who made that; I want to know how it was made. I want to know whether or not this is an honest record and the only way I can find out, the only way, and I have a right to protect my client's rights, and that is to have the privilege of cross-examining the particular human being that had to do with that.

Now, to play on this machine and have this witness Nelson say "Yes" Yes, "Sure, that is right" is just about as good as someone taking a moving picture [redacted] running it back and asking a witness, "did it happen that way?" "Yes, sir, it happened that way," and so you have a witness' evidence that is not admissible at all. In view of your Honor's ruling on the Nardone Case——

The Court: I suppose generally where intercepted telephone talks have been put in evidence, it is quite frequently [fol. 275] to corroborate a witness who has already testified, and that is your purpose here?

Mr. Kaufman: That is right, your Honor.

The Court: About a telephone talk, of course you can not do it as accureately as you think the record will. Of course where you call a man who has tapped the wires and has played the record, you have not only an identity that is an identification of the record, but you have also independent corroboration of another witness. Whether this introduction by the testimony of the man who makes the record is not necessary or not, is something I have never considered. It is certainly the most natural way of putting the record in, and also furnishes what I suppose the man who introduces it wants it, to furnish corroboration of someone else. Thereafter they had the record, and if they want to attack the phonograph record they have to tear down the credibility of the witness who said he supervised the making of it, and it won't suffice just to attack the credibility of a man who is in the position of Nelson, who is testifying now.

Mr. Kaufman: I want to say here, in order to clear up any smoke screen Mr. Stryker has thrown about it, that everything done here, that every record taken as was taken under the supervision of the recorder, and we aren't running away from anything at all. I know what Mr. Stryker is attempting to do. I know it only too well. If your Honor rules we must lay a foundation, and we are of the opinion we don't have to, we will do it most assuredly; we will do it, we have nothing to fear at all. It is our position we don't have to do it, and even with the ruling we don't have to do it. We will lay that foundation later on.

The Court: You know your own strategy better than anyone else, I do not know what the facts of the case are except what I have heard, and what they are going to develop. Do as you think best. If you press, your tender I will rule on it, and Mr. Stryker, if he objects, the Court will pass on it. We will take a recess now until two o'clock.

Note: The following colloquy occurred before the jury [fol. 276] entered the box.

The Court: Do you want to add something, Mr. Stryker?

Mr. Stryker: Well, no; not now. There is one point that I wanted to make, but it is really not germane to this particular offer. I only wanted to have it in your Honor's mind.

I do not think that this proposition is really germane, now, but I would like to state it, so that I will not forget it—and that is this; that certainly with respect to any alleged records concerning my own clients—if any such there are—but which are not offered at this moment, I understand—I wish to add another reason, that in my judgment I have the right and the duty to cross examine the maker of the record to determine whether or not the same was made as a result of physical invasion of the defendant's close, his house or his office or his place.

The Court: You mean c-l-o-s-e?

Mr. Stryker: That is what I mean. As I mentioned yesterday, but perhaps did not make it very clear, in the Olmstead case, if I may add just a sentence, and then you will have my point of view——

Mr. Kaufman: While we are on that point, I think perhaps we can save time, and I can say that there was no physical invasion. They were simply telephone talks.

Mr. Stryker: But you are not the witness.

Mr. Kaufman: I thought perhaps you would want a concession?

Mr. Stryker: No, I would like to have a witness. Now, in the Court in that Olmstead case, and there was a majority there of five to four, and of course, personally I agree with Mr. Justice Holmes—but that does not make much difference——

The Court: It is just as good as a nine to nothing decision.

Mr. Stryker: Oh, absolutely, and what I think about it does not help a bit, but let us see what it says here in that Olmstead case, in the opinion of Chief Justice Taft: "There [fol. 277] was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants."

Then, he goes on:

"A reasonable view is that one who installs in his house a telephone instrument, with connecting wires, intends to project his voice to those outside with the wires beyond the house, and messages while passing over them are not within the protection of the Fourth Amendment."

The Court I think I catch your point. You mean that if any alleged intercepted telephone communication is offered, wherein it is contended or testified that one of the clients

was one of the talkers on the wire, in such a case you think that your objection to the means of identification that the Government now offers is all the stronger?

Mr. Stryker: That is it.

The Court: Because you want to be satisfied, by cross examining the man who made the record?

Mr. Stryker: That is it.

The Court: That there was no intrusion into one of your client's office or house.

Mr. Stryker: That is precisely my point; just that.

The Court: But that does not bear upon the tender now being made.

Mr. Stryker: No, it does not.

The Court: Because I understand the tender now being made is of an alleged telephone talk between two defendants.

Mr. Stryker: Who have pleaded guilty.

The Court: And who are now not on trial.

Mr. Stryker: That is correct. Your Honor has my point exactly, and that is all.

Mr. Kaufman: Now, on that point, your Honor, I repeat that I think a good deal of time can be saved, and I can [fol. 278] state that the telephones were tapped by the police officers and I again offer to stipulate, if they want me to, the manner in which they were tapped.

The Court: He rejects any such stipulation.

Mr. Stryker: I do not care for it.

Mr. Kaufman: In other words, you reject it?

Mr. Stryker: I do.

Mr. Kaufman: All right.

The Court: Well, unless someone wants to add something to this discussion which took place before the recess——

Mr. Stryker: That is all I have, sir.

Mr. Kiendl: May I add, Your Honor, to the objections that Mr. Stryker has already stated, the objections of the defendant whom I represent, Dr. Goldstein, that there is no proper foundation laid for the admission in evidence of this particular record, and that, in effect, it deprives this defendant of the right of confronation and cross examination.

Mr. Stryker: Your Honor also has in mind, no doubt, the added point which I think I made sufficiently clear yesterday, of the common law rule of evidence about the use of a memorandum—the analogy, in other words, that the

memorandum is not admissible unless the witness says he does not recall the transaction at all. Otherwise the memorandum may be looked at by the witness to refresh his recollection, if he had no memory of it whatever, but can swear that he made it. Then I understand the rule to be that the memorandum becomes independent evidence; and it is because this offer does not meet that rule that I add that ground of objection; and of course I join in what Mr. Kiendl said for my own clients.

The Court: I think I made it clear before the recess that the question on the tender now before me was with respect to the laying of a proper foundation. In other respects I am of opinion that the evidence offered is altogether competent. I think the foundation tendered by Mr. Kaufman suffices, if the witness now on the witness stand can testify from a hearing of the record played, that he recognized [fol. 279] the voices, and that he recalls from the record the precise conversation that took place.

Mr. Stryker: And to that I respectfully take exception; and I take it that your honor is not ruling yet;

The Court: I have already stated that the usual or customary way of introducing evidence of this sort is the other way.

Mr. Stryker: I think so myself.

The Court: And generally that is because they have as a witness neither party to the conversation; and perhaps another reason is that the calling as a witness of a man who made the intereception, and who actually did the recording, either by stenographic notes or by a record of some sort, is offered as corroboration—the evidence, in other words, of another witness making the testimony to go before the jury stand upon the credibility of two people and not of one. I have no doubt that that may be stronger proof than the method that Mr. Kaufman says he intends to pursue, but I do not think that means that the method he does intend to peruse is improper or insufficient, although perhaps not as strong.

Mr. Friedman: May we take it that the exceptions inure to the benefit of all defendants, without specifically taking them?

The Court: That is my understanding

Mr. Kiendl: Throughout the trial?

The Court: Throughout the trial, yes.

Mr. Kaufman: I think Mr. Bailey offers a good suggestion; I do not think I will interrupt the trial, throughout the trial, to play each record as we offer it. At one point we will play certain records, and if the defendants want to play them all, they can all be played; but I do not think I will interrupt the trial as I offer each record, to play it, and then offer the next one and play it; but we will offer the record and then offer the transcript, and then read the transcript.

[fol. 280] The Court: And not play the record?

Mr. Kaufman: And not play each and every record at that particular point.

Mr. Stryker: You mean you want to offer them all at once, which you have the machine?

Mr. Kaufman: The records will all be offered, but the playing will take place on a particular day or a particular afternoon.

The Court: All right.

(Whereupon, the jury returned to the box, and the trial proceeded as follows:)

The witness resumed the stand.

(Government's Exhibit 119 bears Dr. Messman's initials and my own on the bottom of each page.)

Government's Exhibit 118, 118a and 118b also bear my initials under date of November 3rd, 1937, and corresponds with the date of Government's Exhibit 119.

I heard Government's Exhibits 118, 118a, and 118b played for me and I identified the voices on those records as Dr. Messman's and my own. (491)

I compared what I heard while I was listening to those records with the transcript, Government's Exhibit 119.

I made corrections on the transcript after I heard the record played over a few times, and when I got all through if the record was correct I then initialed the record and the transcript so that the transcript would then jibe and be an accurate transcription of the record. (492)

Q. And that was what occurred with respect to Government's Exhibits Nos. 118, 118a, 118b and 119 for identification?

A. Yes, sir.

Q. Did Government's Exhibits Nos. 118, 118a, and 118b record, after you looked at Government's Exhibit 119 for

identification, the conversation which you had with Mr. Messman on January 29, 1937?

A. It does.

[fol. 281] Mr. Kaufman: I now offer Government's Exhibits Nos. 118, 118a, 118b and 119 for identification, in evidence.

Mr. Stryker: Well, even under your Honor's ruling I submit that no proper foundation has been laid—the point being that he has not testified that he does not recall the substance of the conversation independently.

Mr. Kaufman: I do not have to ask him that. I am not offering it on that theory. I am offering it on the theory that is independent corroboration.

Mr. Stryker: But you can not have self serving declarations, and the rule of evidence is the memorandum rule.

The Court: I will overrule the objection so far as concerns Exhibits 118, 118a, and 118b, the phonographic records, on the ground that the witness has testified that he recognized the voices and identified the talk.

Now you offer Exhibit 119th at the same time?

Mr. Kaufman: Yes, your Honor.

The Court: The only objection to that, as I understand, is that it would not be the best evidence, being only part of the record.

Mr. Stryker: It is not the best evidence, and also it does not comply with the memorandum rule. The witness not only does not deny that he recalls the substance of it, but his memory is so good that he could correct the mechanical record itself.

The Court: No, that is not it. I understand he testified that he made the typewritten transcript, by corrections, correspond precisely to the phonographic record. That is what he said.

The Court: That is right.

Mr. Stryker: We do not know who did make the transcript.

The Court: That has not been brought out, but it was given to the witness, and he said he heard the records played, and then made such notations of corrections upon the typewritten paper as to make it a facsimile of the phonograph record.

[fol. 282] The only objection that I see to Exhibit No. 119 for identification is that it may not be the best evidence—the phonographic record which the witness says he recognized the voices on, being better evidence.

Mr. Kaufman: Yes, that is right, your Honor. The reason, in addition to everything else, that we are offering these transcripts is so that time may be saved; and if these records are not eventually played, we will lay the proper foundation that they were actually true and accurate transcriptions of the record which was offered in evidence. But if they are played——

The Court: All right, you may mark Exhibit No. 119 in evidence. Objection overruled.

Mr. Stryker: I respectfully except.

(Government's Exhibit 118, 118a, 118b and 119 received in evidence.)

Q. Now, Mr. Nelson, I notice on Government's Exhibit No. 119 in evidence that there appear several Jewish expressions here. Did you read the translation of the Jewish into English appearing immediately under those Jewish expressions?

A. I did.

Q. And were they a proper and accurate translation?

A. It was.

Q. As near as possible?

A. Yes, sir.

The Court: Was this conversation in English or in Yiddish?

The Witness: Part was in English, and certain of the conversations were in Jewish.

Mr. Friedman: If your Honor, Please, I object on the ground that no foundation has been laid to show the witness' qualifications to translate from one language into the other.

The Court: Do you speak both tongues?

The Witness: I do.

The Court: And most of your conversations were in English, but sometimes you used expressions in Yiddish?

The Witness: A few words, from time to time.

The Court: Overruled.

[fol. 283] Mr. Friedman: Exception.

Mr. Kaufman: I would like to read Government's Exhibit No. 119 in evidence at this time.

Mr. Kiendl: May the record show that we are renewing the objections—the additional objections that were made to the records and the transcript?

The Court: Yes, I understand Mr. Stryker's objections embodied everything that had been discussed today.

(Government's Exhibit 119 in evidence dated January 29th, 1937, read to the jury.)

I had this conversation with Dr. Messman. I do not recall where I called from. I was in New York City and called Dr. Messman at Schuyler 4-2277. The Martin referred to is Martin Gross and J. J. is J. J. Weiss. When I said "Downtown" I meant the office of J. J. Weiss and when I used the words "the man higher up," I meant Mr. Weiss.

(Upon objection the jury was instructed to disregard this reference.)

Q. Who was referred to by "the oracle"?

Mr. Stryker: I object to that on the same ground.
The Court: Sustained.

Q. Did you have any understanding with Dr. Messman as to who was mean——

Mr. Stryker: I object to that.
The Court: Sustained. Not any understanding but any conversation.

Q. Yes. Did you have any conversation with Dr. Messman——

The Court: Prior to this talk.

Q. You had or did you have any other conversation with Dr. Messman, where the expressions "baaldvoer" or "Oracle" were used?

Mr. Stryker: I object to that as incompetent, irrelevant and immaterial, and on the same grounds urged before.
The Court: Overruled.
Mr. Stryker: Exception.

[fol. 284] Q. Did you hear the question?
A. Will you repeat it?

Mr. Kaufman: Will you please read the question?

Q. (Read.)
A. I believe we did.

The checks referred to in the conversation were the checks I have previously testified about, namely, the checks I said Dr. Messman told me Gross had given him to pay for Spitz' hospitalization and which came back.

Mr. Kaufman: Your Honor, in order to clarify the record, I would like to offer the corresponding record to Government's Exhibit 110 for identification, which was used to refresh the witness' recollection yesterday; to offer Exhibit No. 110 for identification and the corresponding record into evidence just as Government's Exhibits Nos. 118, 118a, 118b, and 119 went into evidence.

The Court: Is this of the telephone conversation to which the witness testified between him and Mrs. Messman?

Mr. Kauman: That is right.

Mr. Stryker: The one that he read yesterday?

Mr. Kaufman: Yes.

Mr. Stryker: Your Honor, we make the same objection, and I take it I will not have to renew it?

The Court: That is right. Objection overruled.

Mr. Stryker: And the same exception.

The Court: Yes. This was used yesterday only to refresh the witness' recollection, and, therefore, I did not mark it in evidence, but if you want to offer it and the phonographic record with it, with the testimony that he gave yesterday about listening to the phonographic record and comparing it against that, I will take it as simply another form of the phonographic record."

(Government's Exhibit 110 and 110A received in evidence.)

When I said that the checks came back I meant that Gross' checks bounced and were no good on account of the attachment of his account at the bank. (499)

[fol. 285] I followed the same procedure with reference to Government's Exhibits 110 and 110a, that is, I listened and compared them as I did with Government's Exhibits 118, 118a, 118b and 119. (500)

(Marked Government's Exhibits 120 and 120a for identification.)

Mr. Kaufman: I think, your Honor that instead of marking the folders that we would be better off if we marked the phonograph records, because in putting them back in the folders there are several conversations sometimes contained on one record, and I think we would be better off if we marked the fact of the record itself.

The Court: You can put a label on it. If you mark that container you may get it mixed. You can put a label on there or a string and tag.

Mr. Kaufman: The face of this record is now 118b, and the back of this record is now being marked 120 for identifications. So mark that 118b.

(Marked Government's Exhibit 118b.)

Mr. Kaufman: This side is marked 120. With respect to conversations C, 120—Just put C-120.

(Marked Government's Exhibit 120-C.)

Mr. Kaufman: Your Honor, with respect to Government's Exhibits 120 and 120A for the sake of continuity this conversation between Dr. Messman and J. J. Weiss, and we will lay the proper foundation at a later date as to where this call was made from and if Mr. Stryker raises the objection about trespass et cetera, we will also show it is not a trespass.

Mr. Stryker: I didn't hear that.

Mr. Kaufman: It is not a trespass. So subject to connection in that respect we would like to offer this conversation of this witness and identifying voices, and he has heard the record played back to him.

Mr. Stryker: Whom is this between?

Mr. Kaufman: J. J. Weiss and Dr. Messman.

Mr. Stryker: How can this witness help us?

Mr. Kaufman: Just for the sake of continuity.

[fol. 286] The Court: I will sustain the objection.

Mr. Kaufman: He can identify the voices.

The Court: That is all he can show. On his own record, not only recognize the voice but when he hears it played. That is what he said. That is quite different. That is more substantial.

Mr. Kaufman: That is right, your Honor; and at the proper time Dr. Messman will testify to that.

The Court: Offer it at the proper time.

Mr. Stryker: Unless there is some feature other than that I take it I need not object to any part of this line?

The Court: There is nothing.

Mr. Stryker: Transactions between Mr. Messman and Mr. Weiss.

The Court: They are only being marked for identification.

Mr. Stryker? I just don't want to keep on interrupting.

Q. Now, Mr. Nelson with respect to 121 for identification and 120 A for identification did you follow the same procedure as you did with respect to Government's Exhibit 118

and Government's Exhibit 118a and Government's Exhibit 118b and Government's Exhibit 119?

A. Yes, sir.

Mr. Kaufman: I offer them in evidence.

The Court: What do they purport to be? Ask him what they are.

Q. What is Government's Exhibit 129 A, conversation C, and Government's Exhibit 121 for identification?

A. Conversations between Dr. Messman and myself.

Q. Had on the telephone?

A. Yes, sir.

Q. Do you remember where you were when you called Dr. Messman?

Mr. Stryker: Can not we have the dat-?

Q. If the record is that it was January 13th, 1937, would you say that is correct?

A. Yes, sir; that would be the date, and I listened to the phonograph on November 15th, 1937.

Q. And you initialed both the record and the transcript?

[fol. 287] A. Yes, sir.

Q. Do you remember where you were when you made this call?

A. No.

Q. You were in the City of New York?

A. Yes, sir.

Q. And you called Schuyler 4-2277?

A. Yes, sir.

Mr. Stryker: Same objection and exception.

The Court: Yes; same ruling.

(Government's Exhibits 120 and 120 A Marked in evidence.)

Mr. Kaufman: May I read the transcript dated January 13th, 1937, record No. 91-12-C. Incoming, Schuyler 4-2277?

The Court: Yes.

(Mr. Kaufman read the transcript to the jury.)

Government's Exhibits 122, 122a and 122b is a conversation between Mrs. Messman, Dr. Messman and myself on February 1st, 1937. I followed the same procedure with reference to these as I did with reference to Government's Exhibits 118, 118a, 118b, and 119. I do not remember where

I was when I made this telephone call. I was in New York City. I heard this record played and compared it with the [fols. 288-289] typewritten statement on November 3rd, 1937, in the United States Attorney's Office in this building.

(Mr. Kaufman read Government's Exhibit 122 to the jury.)

[fol. 290-295] Government's Exhibits 123 and 124a for identification refreshes my recollection about a telephone call from Dr. Messman on Febraury 7th, 1937. I listened to this record played back to me on November 3th, 1937 and the transcript is a true and accurate one of my conversation I recognized the voices. The same procedure was followed with reference to these records as with the others. (512)

Government's Exhibits 124 and 124a marked in evidence.)

When I had this conversation my telephone number was Tremeon 8-8668.

(Mr. Kaufman read Government's Exhibit 124a to the Jury.)

[fol. 296] On Government's Exhibit 128 the date and initials are November 22nd, 1937, and on Government's Exhibit 128a the date is November 12th, 1937. I heard Government's Exhibit 128a for identification played to me again last night and I compared it with Government's Exhibit 128. I account the difference in dates by the fact that at the time when I listened to this record and I followed the transcript there were several corrections and the corrections were [fol. 297] made in pencil or ink by one of the girls in the room where the exhibits were given to me. I listened to it on November 12th, but sometime later the young lady gave it to me to initial, so I put in the date of the corrections and not the date of the record.

(Government's Exhibit 128a received in evidence, 533.)

I followed the same procedure in the identification of the voices and the correcting of the transcript as I did in Government's Exhibit 118, 118a, 118b and 119. I do not remember where I was when I made the call to Schuyler 4-2277 but I was in New York City.

Mr. Kaufman: At this point, if your Honor please the Government would like to play some records which were introduced into evidence yesterday. We have the recording device ready, we are ready to proceed. However, there is

just one word I would like to say before we proceed, and that is this: that it must be borne in mind these were records which were made of telephone conversations, and if at times it is not perfectly clear any juror who would like to request a replaying of the record to make out the word, the government will be glad to play the record over for them.

The Court: Play it slowly.

Mr. Friedman: May I object on the ground that the records were read yesterday, and that is repetitious testimony.

The Court: Overruled.

Mr. Friedman: Exception.

Mr. Stryker: The general blanket objection covers all this procedure, too?

The Court: Yes, it does.

Mr. Kaufman: For the guidance of the jury, if your Honor please, I would like to give a copy of the transcript to each juror that has offered in evidence.

The Court: And show one to each counsel.

[fol. 298] (Mr. Kaufman hands papers to each of the jurors and each counsel.)

Mr. Stryker: If your Honor please, can we have identified the gentlemen who is now going to operate this machine for us?

Mr. Kaufman: His name is Simpson.

Mr. Stryker: What is his address?

The Court: What is he, an employee of the Department of Justice?

Mr. Kaufman: He is an employee of Mr. John Harley. Mr. Harley is in the sound recording business.

Mr. Stryker: I would like to know who is he and what he is, under oath.

The Court: (Addressing a man in the court room.) Give us his full name, sir.

Mr. Simpson: Hobart R. Simpson.

The Court: Do you want his training or experience?

Mr. Stryker: I assume he knows how to run the machine. I won't waste the time of the Court on that. Who he is, before we start. He is here in some capacity.

The Court: Were you requested to come here by the United States Attorney?

Mr. Simpson: By Mr. Dailey.

The Court: By whom employed?

Mr. Simpson: By Mr. Harley.

Mr. Stryker: Where is their place of business?

Mr. Simpson: 122 East 42nd Street.

Mr. Stryker: And what is the business?

The Court: What is the title of your company?

Mr. Simpson: Detective agency.

Mr. Stryker: May these statements be deemed to have been made under oath?

The Court: They can not be unless he is sworn.

[fols. 299-559] Mr. Stryker: Will you swear him, your Honor.

The Court: Yes, I will do that the same as I would with an interpreter.

Mr. Stryker: Yes, your Honor, I think he should be sworn.

Hobart R. Simpson, was then called as a witness on behalf of the government. The answers I have heretofore given I now state under oath.

Mr. Stryker: May I ask an additional question?

By Mr. Stryker:

Q. Is it a private detective agency and a licensed detective agency?

Mr. Kaufman: It is not a detective agency.

Mr. Stryker: A private detective agency, a licensed detective; is Mr. Harley a licensed detective?

A. Yes.

Benjamin Nelson resumed the stand.

(The following procedure then took place. The jury listened and followed the transcript as a record was played before them. The following exhibits were played aloud on a reproducing machine: Government's Exhibit 110, 121, 121a, 123, 123a, 123b, 125, 125a, 127, 127a and 127b.)

Government's Exhibit 133 and 133a is a conversation between Messman and myself on March 2nd, 1937. I heard it played to me and recognized the voices as Dr. Messman's and my own. I initialed all these exhibits. I do not remember where I was when I called but I was in New York City, and I followed the same procedure, checking the accuracy as I did with the other exhibits. I identified these November

4th. They were played to me by a girl in the United States Attorney's office.

(Government's Exhibits 133 and 133a marked in evidence.)

(Government's Exhibit 133a read to the jury.)

[fol. 560] PHILIP E. MCGLYNN, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Kaufman:

I am a detective in the New York City Police Department. I have been with the New York City Police Department for thirty-five years. For about thirty years I have placed taps on telephone wires for the Police Department (1223). I was assigned to Deputy Chief Inspector Lyons until he became Second Deputy Commissioner. I am assigned to the same office, practically the same office he controlled, and now under Captain Dowd. On or about February 24, 1937, at the request of Post Office Inspector Shea and on the instructions of my superior, I placed a telephone tap on five telephone wires of J. J. & A. L. Weiss at 276 Fifth Avenue, listed as Bogardus 4-4850, 4851, 4852, 4853 and 4854. I ran an extension of these wires to the fourth floor of 1200 Broadway (1224). I labeled those wires and I labeled them for the corresponding telephone wires, in other words, of 4850, 4851, 4852, 4853 and 4854. Inspector Shea was there and I left the wires in his custody and under his control, after testing them (1225). On the 28th day of January, 1937, I placed a telephone tap on Schuyler 4-2277, the telephone of Dr. Hirsch L. Messman of 315 Central Park West, and I ran an extension of that tap to the first floor of 32 West 91st Street where Inspector Shea was and left the wires in his custody and under his control after testing them (1225). I had a partner, also a New York City detective, in placing these taps on those wires, Robert L. Lewis (1226).

Cross-Examination.

By Mr. Stryker:

We went into the cellar of the premises of 276 Fifth Avenue. We tested the wires there on the terminal. We

went in the day time. This building is the old Holland Building. We made a test there, found out that they bridged with the other premises, 1200 Broadway, with that multiple [fol. 561] there. Then went to 1200 Broadway and made a test there and then from 1200 Broadway ran them to the fourth floor into the room that Inspector Shea was in. I never saw the recording ins-rument that recorded the conversations (1226). I left Inspector Shea in charge of the wires with the numbers on. He was there when I made a test of the proper numbers. He never told me about a recording machine and I never asked him. Those are my orders. My orders not to know anything about recording machines, and I don't know anything about it. My testimony is confined solely to the installation of the wires (1227). I don't know whether the Police Department has any recording machine. I cannot talk for them. I can talk only for the main office. They have no recording machines at the main office of the detective department for recording conversations.

Mr. Stryker: Let me see, as a detective with such long experience as yours, I presume you are reasonably familiar with the statutes of the State of New York?

A. I am no lawyer.

Q. No, but you are a detective.

A. That is right.

Wire tapping is not a felony under the laws of the State of New York when used to apprehend a criminal. I know of no provision that permits anyone to commit that felony but you can use any apparatus that a person may use for the purpose of commiting a crime against him for his apprehension. I did not say that the police can commit any crime they wish provided it is with a good motive to detect another crime, but they can use any device that a criminal uses in the commission of a crime against him for the purpose of apprehension. I don't know what the criminals in this case were doing. I was told to do the work by my chief; he told me it was a criminal investigation.

Though the New York Penal Statute, Section 1463, Subdivision 6, makes wire tapping punishable by not more than two years under the laws of New York, it does not apply [fol. 562] in apprehending a criminal in a criminal investigation (1228). I never in my life heard of the Leeds Wireless Company or of a man by the name of Adolph Leopold.

I never heard of a firm by the name of Silver & Bernstein, or that Leopold was in any way related to them. I never met those gentlemen.

We do not go to the owner of the building when we make the tap. We go in as telephone men and do our work. On those cases where we are going to put in a wire for our own use, we have someone from our department to do so, but on this particular occasion requested them to do it themselves. We didn't tell them we were detectives.

Mr. Stryker: You didn't go in as a policeman would do and say frankly to the——

The Court: What has this got to do with it? This man is not on trial. It doesn't matter whether he knows the statutes of New York or not.

I don't know anything about these wires other than the work I did myself (1229). The day I tapped the Schuyler number was January 28, 1937 and the other one (Bogardus number) was February 24, 1937. I was not told by anyone as to whether there were prior taps made on these wires by anyone before the authorities, before the police went in and made them.

Redirect examination.

By Mr. Kaufman:

I did not find any evidence of any previous taps having been placed before I placed mine there. If a first class job was done there would be no evidence left that a tap had been made (1231). I have heard in the course of my experience of a private detective or private persons other than member of the Police Department making wire taps but I never personally came in contact with anyone doing it. [fol. 563] Hobart A. Simpson, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct-examination.

By Mr. Kaufman:

I am 45 years old. I have been educated in the schools of New York City. I am married and live with my family.

For quite sometime, I have had experience with recording apparatus and transmittal apparatus. My experience in this field is that I was with the United States Signal

Corps at Fort Monmouth in the development of apparatus, transmission, receiving. I formed a corporation for the manufacture of receiving apparatus and various parts connected with it. I was employed as superintendent of the Stevenson Laboratories in Plainfield, New Jersey. I then formed another corporation for the manufacture of sound apparatus and then was connected with the Jones Research Laboratories in the same line of work. From there, I went to John S. Harley, with which firm I am employed at this time. I have been employed by John S. Harley, Inc., for a period of approximately five years and I have been continuously employed by them. My connection, or rather work, has been the development and installation of recording apparatus.

On or about March 9th, 1937, I made an installation of recording equipment at 1200 Broadway, New York City. I received my instructions to go to 1200 Broadway from my office. When I arrived at 1200 Broadway, I went to the fourth floor. My instructions from the office were to go to the fourth floor in the rear and that I would find a room with a door open, and that I would find five pairs of telephone wires which I was to connect up to the apparatus.

When I arrived there, Post Office Inspector Shea was at the premises and pointed out the wires to me. I connected up the wires to the recording apparatus under his instructions. After the wires were connected, we tested each line. At that particular time, I did not know that the lines belonged to J. J. & A. L. Weiss. I checked the lines and tested them to see that they were the proper numbers on each line; in other words, the lines were tagged as 50, 51, 52, 53 and [fol. 564] 54. In other words, they were checked to see whether they were actually taps of the wires on Bogardus 4-4850 to 4854.

By Mr. Kaufman:

Q. Just briefly describe how these recording machines operate.

A. Well, I will give you first the dial registers, which record the numbers dialed.

The Court: These gentlemen over here have to hear you. Speak louder.

The Witness: All right sir. The dial registers are used to record the impulses on the telephone line, of all numbers

that are dialed. When a receiver is raised, the dial-register goes into operation; and just for example, if this number "Cortland 7-7100" was dialed, the letter "C" would correspond to "2"—the two dot impulses which would be printed on the tape. And "O" would correspond to "6", with six impulses printed; and "r" would correspond to "7", and when you got to the "7100" you would have the "72 and "1" and for the zeros you would have "10".

On your rings for incoming calls, you have a multiplicity of dots recorded, showing a ring.

Q. And by counting the dots printed upon the tape, when "Bogardus 4-4850" was called, you could tell by the numbers on the dial?

A. Always, yes.

Q. So much for the dial tape. Now, these machines operate on turntables?

A. We had at that particular location a switchboard set up with two recording machines. The lines were brought into the switchboard, and the switchboard was connected with the recording machine, and also connected to the table, on which there were five pairs of head phones for monitory purposes or taking down notes from the line.

The Court: For what kind of purpose?

The Witness: Monitory.

The Court: What is that? A precautionary measure?

The Witness: No, they take down stenographic notes [fol. 565] from the lines. That is for taking down stenographic notes. If a call should come in—perhaps I had better say that the two machines were known as "1200" and "1201".

Q. Were those arbitrary numbers just taken for identifying the records taken on either machine?

A. That is correct. For instance, if an outgoing call was made, the drop would come down, signaling a call going out on that line.

Mr Stryker: A drop?

The Witness: A signal drop. If a call was coming in, we will say, on line "50" which was "4850," the signal drop would come down, and the operator in charge of the switchboard would take a plug of that line and connect it with No. 1200 recording machine, and would plug it in, connected with the machine, with the incoming call, and would call

out "record." Immediately the operator in charge of that machine would touch a button, starting up the recording apparatus.

In that way, the girl would get the full conversation and the girl who listens in on the earphones to that very conversation would also get the conversation and take down in shorthand what was coming over the line. Each machine had two turn tables for two records. The purpose of two turn tables was to insure continuity of conversation. These turn tables would operate in the following manner. For example: If No. 1 turn table was started, and ran approximately five minutes, at the end of that period of time, No. 2, on the right, would automatically start in operation, and at the same time both turn tables would be running, and both records, and at the end of No. 1 table there would be possibly three or four lines recorded, and the same number of lines would be repeated on No. 2 table.

Thus there would always be a continuity of conversation. If the conversation was so long that it ran through a record on number 2 turn table, the operator would put in a new record on turn table No. 1 so that the conversation again beyond No. 2, and back on to No. 1 again.

After the installation of this recording apparatus on March 9th, 1937, I was in complete charge of the machines [fol. 566] and the sound record devices were under my complete supervision.

By Mr. Kaufman:

Q. And who operated the machines and made the recordings?

A. Six girls from our office.

Q. Now, Mr. Simpson, in order to remove any erroneous impression that may have been created here, did the John S. Harley Company have anything to do with this particular case, other than to install recording apparatus and operate the recording machines?

Mr. Stryker: I object to the form of the question as improper.

The Court: Do you know of any other connection that your employer or that you had with this case, other than the installation and supervision of those sound apparatus or machines?

The Witness: That was the only connection that we had with the case.

Mr. Kaufman: Thank you.

Q. Did anyone other than the employees of John S. Harley, Inc., ever operate that recording equipment for the taking of any of the records?

A. No one was allowed to operate the machines but our employees. We had a regular system for identifying and marking all phonographic records. I will try to explain to the court and jury and give as clearly as I can the method that was followed out in certifying the accuracy of these records by taking a typical record, Government's exhibit 151-A in evidence. On this particular record, it showed three different recordings with a space between each one. In this case the first recording would be known as "A" cut" or "A" recording; the second would be known as "B" and the third as "C". Thus, if a conversation was short and did not require the entire record, we would use that same record for several conversations. I would move the needle or handle over so that it could record further conversation if one came in or went out, and the second conversation on the particular face of the record would be "B cut". All the recordings were actually made on discs similar to that which I am now holding in my hand and they were done in [fol. 567] the manner which I described. That is the only type of record or disc that we ever used. There were no wax cylinders or anything of that nature and this is the actual original record and the conversation was recorded on those records in the first instance.

In addition to the notation of the cuts, which I will speak of as "A", immediately the machine was started or a call was received, the time was put down on the record—and in this case it is 4:05—and the line that it came over on—Bogardus "50", which would be "4850" and also the recording machine in this instance was No. 1200. The girl who was operating that machine was on machine No. 1200 and to distinguish the machine, she would put down on her record 1200 to denote her particular machine. The girl who took a record on machine 1201 would put down on that record 1201 if it came over on that line. In this particular instance it was machine 1200 that took the record.

The particular number of this record in this particular case is "580". "580" means that this is the 580th record

that was recorded on machine No. 1200. The initials of the operator in charge of the record, who does the particular recording—the girl—and in this case it was "H. C." and also another initial appears, which was the girl that might be monitoring. The monitor is a girl who listens in and takes stenographic notes at the same time that this particular record is being recorded. There were six things that appeared on the face of these records—and I believe those records are called RCA Victor Home Recording Records. There were six things on those records to certify the accuracy of the record and one was the date on which the record was taken (1237-1240). Secondly, the particular cut or record is recorded as "A, B, C, or D"; fourthly, the time to the nearest minute, when the conversation began; fifthly, the particular line number or trunk line over which the conversation went or came, such as Bogardus 4-4850 or 51 or 52; and sixthly, the number of the record is notated and in this case it is "580".

The Court: Were all these conversations taken down in [fol. 568] two ways; one on the recording machine, and two, by the use of earphones and stenographic notes?

The Witness: Yes, they were.

The Court: Have you seen those typewritten statements that were offered in evidence here last week?

The Witness: No, I don't think I have.

The Court: Could you say whether or not those are the stenographic notes?

The Witness: I could not say? Because I cannot—I do not use shorthand, and I would not be able to read the notes anyhow.

By Mr. Kaufman:

Q. Now, Mr. Simpson, every record labeled either "1200" or "1201" would contain conversations either sent from or received through the trunk lines Bogardus 4-4850 to Bogardus 4-4854, inclusive?

A. That is right.

Q. Now, will you tell us, Mr. Simpson, all of the employees of John S. Harley Company who operated at one time or another these recording machines?

A. I will try to recall them all. You want the full names?

Q. Yes.

A. There was Ida Handman, Marguerite Healey, Helen Capperell, Mrs. E. Morris——

Q. How many have you there?
A. I forgot how many I have given.

The Court: Four.

Q. Did you give us Rose Guttman?
A. No. Rose Guttman.
Q. And Miss E. Owens?
A. Yes, and Miss E. Owens.
Q. So that if one of those girls was operating one of these machines, her initials would appear upon those records?
A. That is correct.
Q. And that was generally the system which was devised to be followed in this particular case?
A. That is right.
Q. Now, aside from your own employees, Mr. Simpson, there were stenographers present taking these conversations, were there?
A. Yes, sir.
[fol. 569] Q. And they sat at a separate table, with earphones?
A. Yes, sir. On these particular phonographic recordings there are two sets of initials, one of which are the initials of the person who recorded it or who worked on the machine and the other set of initials are those of the particular stenographer. Neither I nor my sound operators have anything to do with those stenographers. It is my understanding that those stenographers with whom I had nothing to do were from Mr. Shea's office—that is, Post Office Inspector Shea's office.

I have told you about machine numbers "1200" and "1201" which were the Weiss wires on Bogardus 4-4850 to 4854.

I also had occasion to install a machine at 32 West 91st Street, which was likewise done pursuant to instructions which I had received at my office. I think that I installed a machine there on January 29th, 1937. On arriving there, I met Post Office Inspector Shea. There was just one line there which had a tag on it. We connected the apparatus to the line and tested the line to prove whether it was labeled properly or not. That line had on it telephone number Schuyler 4-2277. That line belonged to Dr. Hirsch L. Messman. The operation of that machine was similar to the operation of the machine which I have just described.

All the operations were the same with the exception that there was no dial recorders or registers used on the 91st Street operation, due to the fact that Dr. Messman's line was a manually operated telephone when numbers were called.

I had the same system of certifying and identifying the records with respect to the records taken at 1200 Broadway with the exception that the records instead of being labeled "1200" or "1201" were labeled at the beginning "H M" for "Hirsch Messman" and "91". There was a further exception that it was not necessary to have the particular line shown such as Bogardus 4-4850 to 4854 because in Dr. Messman's instance there was only one telephone wire.

The means that were taken to certify the accuracy of those recordings, an example of which was the typical record, Gov-
[fol. 570] ernment's Exhibit 133-A in evidence which particular record has three recordings on it and it is marked "A". That record has three cuts, "A, B and C". Those three cuts represent three separate talks, three calls. The time, for example given on A cut is 9:57 A. M. the number "91" appears, which denotes that particular location. "227" is the number of that record. The initial of the operator are "M H". The individual listening in at the time of that conversation, as near as I can read, was one "I M", and the date is "3-2-37".

I was likewise in complete charge of the recording apparatus at those premises. The recording apparatus at "91" was installed a little while before the recording apparatus at 1200 Broadway. When the recording apparatus at 1200 Broadway was installed, I made my rounds between the two places daily.

By Mr. Kaufman:

Q. And would you see that only one of your girls operated the machine at "91" also?

A. That was the only person that we had to operate the machines—or myself in one or two instances.

Q. And would you say that it was one of the girls whom you have mentioned before?

A. That is right.

Q. And were those conversations also taken down stenographically?

A. They were.

Q. By one of these girls that you said Inspector Shea sent down?

A. That is correct. (1246)

Q. Now, at the end of each day were these records picked up by a representative of Inspector Shea, and sent to the office of the United States Attorney?

A. They were.

Q. Where they were filed away, is that correct?

A. That is correct.

Mr. Kaufman: Your witness.

(1241-6)

Cross-examination.

By Mr. Stryker:

[fol. 571] My duties as appears from my direct examination for the past five years has largely been confined to the installation and development of the recording machines. I mean by that designing, manufacturing and developing new apparafus—new ideas to use in the apparatus. I have been working for the Harley Detective Agency for the past five years, where we make the machines. The Harley Detective Agency makes the machines and are the manufacturers of them.

In addition to doing private detective work, we also manufacture all machines for our own apparatus. The recording apparatus that is used in a room to pick up conversation from a tapped wire is approximately what you see there on a bench or table (indicating) on the other side of the room. I mean that machine on the left of Mr. Stryker. The amplifier is the same used in taking the taps and the tables that are used for recording are likewise the same as are over there. The instrument over there is the one which gives us the voices and it is also the same machine that takes in the voices. We have our own place for the manufacture of these machines. It is merely a laboratory for the manufacture of such machines as we need for our own use. We actually construct every part of those machines ourselves.

The Harley Detective Agency is a private detective agency as I said the other day. When I stated on my direct examination that I went up to this office at 1200 Broadway under instructions from the office, the particular person who gave me the instructions was Mr. Harley, John S. Harley. Mr. Harley is in New York. He gave me the instructions on

March 9th, 1937 with respect to 1200 Broadway. With respect to 91st Street, I received my instructions from Mr. Harley on January 29th, 1937. With respect to the apparatus which was installed at 91st Street, it was placed in an apartment in the rear of 32 West 91st Street, which I would call the first floor. That was not the same building in which Dr. Messman lived; it was another building. I did not get in there by stealth, *by* Inspector Shea had rented the apartment under his name as Frank Shea.

By Mr. Stryker:

[fol. 572] Q. Now, you have been working, I gathered, for the past five years in installing these instruments and recording conversations over telephone wires that people thought were private?

Mr. Kaufman: Oh, that is objected to, your Honor.

Mr. Stryker: All right. The question is withdrawn.

Q. Over private wires?

Mr. Kaufman: You are summing up with every question, are you not, Mr. Stryker?

Mr. Stryker: I object to this type of criticism. I will bow, of course, to the Court's ruling, but I submit that the question is proper.

The Court: Yes. We are not concerned here in the morals of wire tapping—not in the least.

Mr. Stryker: I understand, but I am concerned with the credibility of the witnesses and the surrounding circumstances in this case.

The Court: Yes.

Mr. Stryker: And that is why these gentlemen have been put on, according to Mr. Hardy's remarks this morning. Now, what was the last question, please?

(Record read.)

By Mr. Stryker:

Q. Over private wires—you have done that?
A. If you want to put it that way.
Q. Well, I want to put it the way that the fact is.
A. O.K.
Q. Then, that is the fact?
A. Over private telephone wires, if you want to put it that way.

Q. It is not the way I want to put it, but is that the fact?

A. That is the fact, yes.

Q. All right. Is there anything about my putting it that way that does not properly bring out the truth?

A. No. I did not in the course of my work at 91st Street or [fol. 573] 1200 Broadway come into contact with any law firms. With respect to lawyers, Mr. Bernstein was in I think when we made the first installation with Inspector Shea and two other men from the federal offices here. (1246-50.) Mr. Bernstein is not a technician. I did not require his services at all in order to ascertain how to put these machines in or how to work it.

By Mr. Stryker:

Q. Well, did you ever have any of these machines in any law office, either Silver & Bernstein, or any other office?

A. We have had these machines in possibly a good many offices.

Q. I do not blame you for your answer. The question was not explicit. I mean this: These machines, have you had them in any other law office since you made these particular recordings in this case?

Mr. Kaufman: I object to the question, your Honor, because I do not see the relevancy of it to the issue here. The sole question is whether he installed them accurately at 1200 Broadway and at 32 West 91st Street.

The Court: Mr. Stryker is entitled to some latitude on cross examination. Overruled.

Mr. Kaufman: I submit, your Honor, that this man has probably installed an awful lot of these things, and some were probably confidential.

The Court: Well, we are not going into any other installations that he made a year ago or three years ago or anything like that. Nothing of that confidential sort will be brought in here.

Mr. Stryker: I can assure you that I shall not ask for any confidential information involved in any other case; but I would like to know how this man and his detective agency works, and that is what I understood he was brought here for.

The Court: Go ahead.

Mr. Stryker: What was the last question?

(Record read.)

Q. Now, please bear in mind that I am not, in that ques-
[fol. 574] tion, seeking to elicit testimony about some other case at all. I mean did you take these records that you used in this case, as you have testified—did you have those in any other or in any law office other than the Government office at any time? I said, I believe, "records", but I meant to say "these machines or records that you used in this case."

Mr. Kaufman: You mean the machines that were at 1200 Broadway and at 91st Street?

Mr. Stryker: Yes, just exactly that.

The Court: Suppose you put the question again—there has been so much talk about it.

Mr. Stryker: Yes.

Q. You had a machine similar to this thing over there on the table (indicating) at 1200 Broadway, did you not?

A. That is correct.

Q. Where you could listen in on the Weiss wires?

A. Yes. I had another machine at the 91st Street address. It is correct that there came a time when I got through listening at these places and my job was done and my records were all made.

By Mr. Stryker:

Q. Why do you hesitate? Do you mean that you are still going on with it?

A. There was no hesitancy there at all.

Q. Well, are you still going on recording conversations right now?

A. No.

Q. I do not mean at this moment, but during this trial?

Mr. Kaufman: Oh, Mr. Stryker, you can have my word that we are not.

Mr. Stryker: This witness was tendered to me, and he is put on here for an express purpose——

Mr. Kaufman: You asked a question, and I have offered you my word——

Mr. Stryker: But I am entitled to an answer, I submit.

The Court: He may answer.

Mr. Stryker: Will you read the question?

[fol. 575] The Court: The substance of it was this; whether there are still sound apparatus of machines on those wires.

Mr. Stryker: Yes, that was it.

The Court: That is, the Weiss wires and the Schuyler wire—the Bogardus wires and the Schuyler wire.

Mr. Stryker: Yes, precisely.

The Witness: No, there are not.

By Mr. Stryker:

— When were they taken off?

A. I can give you only possibly an approximate date, without looking in my memorandum book.

Q. Have you got your memorandum book with you?

A. Yes, I have.

Q. Well, take a look at it, and tell me?

A. (After examining book) I haven't got it in this one.

The Court: Give us the approximate date.

The Witness: The approximate time was, as near as I can recal-, somewhere around in May—the latter part of May or the fore part of April.

Q. Does not your memorandum book enable you *go* give better than an approximate time? Does it not tell you exactly when it was?

A. The only memorandum I have is the date of installation.

Q. What did you look at which enabled you to say it was the latter part of May that you took those things out?

A. Well, that is my memory of the approximate date. I would not attempt to give an accurate date without the memorandum book, where I have all that listed—when we made the installation, and also when we took them out.

Q. Then, that book which you have now does not help us?

A. No. I thought it did, but it does not.

Q. All right. That is a different book, then?

A. Yes.

Q. Now, have you, since these records were made, had this machine or a similar one in any law office, on which the rec- [fol. 576] ords were played, prior to the beginning of this trial?

Mr. Kaufman: If Mr. Stryker will step up to the bench and state his reason for this——

Mr. Stryker: I am asking a question, and I do not want to step up anywhere.

Mr. Kaufman: I still think that he is attempting to bring out a lot of confidential matter—"any law office"—and I submit that they must have had an awful lot of dealings with law offices.

Mr. Stryker: Mr. Hardy stood up here this morning——

The Court: As I understood, the question had to do only with these machines and whether these records were played.

Mr. Kaufman: Oh, then, all right. The objection is withdrawn.

Q. Have you?

A. No, none of these machines has been used for playing records in any law office. I understood that was your question.

(1251-5)

Not to my knowledge were these records played in any law office. I do not know that these records were in any law office at all. The only source of deposit for the records was in Frank Shea's office, and they were given into his possession, and what happened to them after that I don't know.

I have been in Silver & Bernstein's office. The first time that I was there was some months ago. The memorandum book which I have will not tell me the date that I was first there.

By Mr. Stryker:

Q. Give me your best recollection of when, for the first time, you went to the office of Silver & Bernstein?

A. Well, I might have been in their office five or six times all told, approximately.

Q. But can you tell us when for the first time?

A. It might have been around three years ago or two and a half years or three years ago or something like that, as near as I can tell.

Q. About three years ago—and that would be about 1935?

[fol. 577] A. That would be as near as I could check.

Q. And were you in their office then in connection with looking into some matter connected with this case?

A. Connected with other cases.

Q. Not this case?

A. No.

Q. Or with these defendants whom I represent, the two Weiss brothers, lawyers?

A. No; on other recording only for Mr. Bernstein.

Mr. Kaufman: The answer is "no", is it not?

The Witness: Yes, I will say "no".

Mr. Stryker: I object to this highly improper interruption—shouting at the witness "no". I submit that is quite improper.

The Court: Go ahead.

The Witness: May I make a statement on this?

Q. Yes, you may say anything you want.

A. Due to the fact that there are many attorneys that are using our service for recording purposes, it is hard to give a clean answer, as you see, as to what we are doing in particular instances, because there are other cases where we use microphones, as well as where we record on the wire. They employ our services for that purpose, and a lot of that is confidential information.

Q. I will not ask who the lawyers are or anything of that kind. I am not interested in that, and I only want to find out generally. Then, you use this information for lawyers in connection with private civil cases?

A. For their own personal use.

Q. I do not care what the use is, but you accept pay and are hired to install these machines on private wires in private cases, where the police have not been called in or are not present?

A. No, we do not. You misunderstood my statement. For microphone purposes only. The only time that we record from telephone wires is with the authority of the police department.

These machines are manufactured for our own purpose and use only and they are not sold to any individual. We do not rent them to anyone nor do we loan them to any- [fol. 578] one. We do not use them, or these telephone-listening machines, in connection with cases other than criminal cases.

Our detective agency does not handle divorce work. I personally do not do any other detective work other than in connection with the technical part of these machines. Well, it is possible that our company does do shadowing or the usual detective work, but that is something that I have not

any connection with at all, and I personally do not know about that. I do think that our concern does that kind of work.

The first time that I saw Silver & Bernstein or either of them in connection with any matter related to the Weiss brothers was when the installation was made at 1200 Broadway.

By Mr. Stryker:

Q. Without mentioning the names of companies or the matter—I do not care about that—but your prior contacts and visits with Silver & Bernstein related to work in which the clients of the firm were insurance companies?

A. Will you repeat that question? I did not get it clearly.

Mr. Stryker: Read it, please.

(Question read.)

Mr. Kaufman: You mean clients of the firm of Silver & Bernstein?

Mr. Stryker: Yes, or his either—I don't care which.

The Witness: I don't think I can answer you in that way.

Q. Well, all right.

A. I will put it this way, if you want me to—that my contacts with the office of Silver & Bernstein were on other work that they were doing, not in conjunction, and I think that is about the clearest answer I could give you.

Q. Well, I may be very dumb, but it is not at all clear to me. You have not told me who the clients were, and that is what I want to know; not their names, but were they insurance companies or not?

A. Not to my knowledge.

Q. What?

A. Not to my knowledge.

[fol. 579] Q. Not to your knowledge?

A. That is right. I mean that I do not know of my own personal legal knowledge as to whether my work was to be in connection with the insurance companies. Silver & Bernstein did not tell me that this job was for insurance companies. I can answer "no" on that. I had heard mentioned in that office while I was working at the time something said about insurance companies—that there was an investigation along that line. That was not in 1935. I do not say that

when I first met the firm of Silver & Bernstein that it was in connection with the insurance investigation.

By Mr. Stryker:

Q. You told me you were first in Silver & Bernstein's office in 1935, did you not?

The Court: This line of questions has no relation to any particular date——

Mr. Kaufman: Your Honor, I must object to these questions along this line, because I do not see that it has to do with the accuracy of these records.

The Court: Well, we will take a short recess. Will counsel step up?

(1255-1260a)

By Mr. Stryker:

Q. Mr. Simpson, will you tell me again so that I understand it clearly, there were taps on all of the Weiss brothers' wires, were there not?

Mr. Kaufman: I think this witness has testified that he did not place the taps on those wires.

Mr. Stryker: Well, I will ask him if he knows.

The Court: Ask him if he knows.

Mr. Kaufman: I think the question is misleading, your Honor.

Q. Do you know how many wires of Weiss brothers were tapped?

A. All I know is that 4-4850, 4851, 4852, 4853 and 4854.

[fol. 580] Mr. Stryker: What is misleading about that Mr. Kaufman?

Q. How many?

A. Five wires.

It is correct to state that from the time I had this machine working at the premises and these girls with earphones and so on, who were listening in, that every call that went out and every call that went in to the Weisses office over those five wires were recorded. I did not tell Mr. Kaufman on my direct examination that there were some 1400 records made. I cannot give you an answer as to whether or not 1400 records were made. My best answer, which is not the exact number, is that there were probably about 1400 rec-

ords made and it might have been a lot more as far as I can recall.

By Mr. Stryker:

Q. Now some of these calls that you listened in on were calls to Philadelphia, Boston and other places outside of the State, were they not?

A. Might have been. Any call that came in would be recorded and listened to, any call going out, I couldn't tell you where from.

Q. If any call was made on the Weiss brothers' wires during this time, you listened in and recorded it?

A. Yes, sir.

Mr. Kaufman: I ask the Court to take judicial notice of the fact that there was nothing illegal at that time as to calls going to New York, Boston, Philadelphia, or any other point.

Mr. Stryker: Can not we have law objections?

Mr. Kaufman: That is an objection. I ask the Court to take judicial notice of that fact.

The Court: It is not material at all at this time. The witness has not said there were such calls; "if there were" he listened in on them.

Q. Do you remember some yourself?

A. No, I do not.

Q. Well then all the business that was transacted over the Weiss wires with whatever private clients they were, and whatever it was, entirely unrelated to the case involved here, were all listened in on and put on record?

[fol. 581] A. Every ingoing and outgoing call was recorded.

Q. And all the information you got in that way, whether related to this case or not, all of that was turned over to the insurance companies?

A. It was turned over to Frank Shea, Inspector Shea.

Q. But Silver & Bernstein, lawyers for the insurance companies, they all had access to that?

A. Not to my knowledge.

Q. What?

A. They might have.

Q. Don't you know?

A. No.

Q. Were you not ever present when those things were played in the United States Attorney's office?

A. Yes, sir, once or twice when I played them myself.

Q. Aren't you the man that they call for when they wanted to hear those things played?

A. I did that.

Q. For whom?

A. Only for Mr. Kaufman.

Q. In some instances when you did it Silver & Bernstein were present?

A. No, they were not.

Q. Did you ever take any of these records to the office of Silver & Bernstein?

A. No.

Q. But you were in their office after you began tapping the Weiss brothers' wires?

A. Previous to that?

Q. Previous and after?

A. Yes, sir that is correct.

I have no knowledge of anything in connection with wire tapping as to whether anyone from Mr. Harley's office worked on this case before I made the installations on March 9th, 1937, except that on January 29th, 1937 I listened in to some talk of Dr. Messman beginning on that day. On March 9th, 1937, I did the installation on Weiss' wire. No, I don't know of any connection in which there was any listening in on the Weiss's wire prior to March, 1937.

Prior to March, 1937 on No. 1200 there was headphone installations for approximately four or five days as near as I can recall. As far as my personal knowledge goes, or [fol. 582] from what I heard, there were no tap recordings of the Weiss brothers' wires prior to January 29th, 1937. It depends upon what our demand is as to how many of these machines we make a year. There is no particular average as to how many we make a year but we might make two. We have eight machines on hand, and that is about all the recording equipment we have that registers. If they are all in use we might make another piece of apparatus. Outside of that, that is all.

By Mr. Stryker:

Q. Does the Harley office show the record of when your office went to work in tapping the wires of the Weiss brothers?

Mr. Kaufman: They didn't do that.

Q. A record of the Weiss tapped wires?
A. I can't answer that: I have no connection with it.
Q. You don't have anything to do with the accounting?
A. No.
Q. Do you know whether or not Harley got $75,000 from the insurance companies for this job?
A. I couldn't answer this question because I don't know.
Q. What?
A. I don't know.

Mr. Kaufman: I object to that, if your Honor please, upon the ground that there is no evidence that they did any work for any insurance company.

The Court: The witness says he does not know.

Q. Did you ever have any talk with Silver or Bernstein about that subject?
A. No, I did not.
Q. What?
A. No.
Q. Did Harley ever say anything to you about it?
A. No—no, he didn't. I was going to qualify that.
Q. Take your time.
A. No, he didn't.
Q. How are you going to qualify it?
A. My first knowledge or instruction, as I stated before in 1200 was when Mr. Harley spoke to me about it; I was to go downtown and make that installation, and it is the policy of the office on any work that comes there, no matter [fol. 583] from whom, we know nothing about it except make the installation.
Q. It is carefully provided that you be kept out of knowledge of that subject so that you cannot testify about it?
A. I wouldn't put it that way.
Q. How would you put it?
A. Just the stated policy of the office, no man knows what the other is doing.

I never heard from Mr. Harley or anyone in his employ or connected with him who tapped any telephone wires without having previous alleged permission from the police. I know that. I do all the installation work. I have not done any installation work for lawyers of insurance companies, none at all. I have not done any installation work for lawyers of insurance companies.

The Court: I think the examination should be limited to the accuracy of the work he did. I will allow any amount of that, as to what he did. Anything tending to show that the record was defective or anything bearing at all upon the accuracy of what the witness has testified to on direct examination that he did.

Mr. Stryker: Of course I immediately bow to whatever ruling your Honor makes. I wish to make myself plain to the Court the reason I am cross-examining this way is because of the statement that Mr. Hardy made at the opening of this trial in which he referred to my point, that he was going to produce evidence to countervail evidence that the insurance companies were back of this investigation, and that is the purpose of changing the program. It is because of that statement made in the presence of the Court and jury that I am cross-examining the witness now. However, if your Honor directs me to cease, I will cease immediately.

The Court: I don't think the cross-examination is proper along that line.

Mr. Stryker: I take an exception, your Honor. That is all.

(1261-67)

[fol. 584] Cross-examination.

By Mr. Schwartz:

I stated that telephone taps were placed on 1200 and 1201 at 1200 Broadway. Five pairs of taps were placed on five wires. If all five wires became engaged at one time, then only two recordings would be made at one time on the records. The other three wires became active and at the same time the stenographers would take down in shorthand what went in. The machines could make two records from two wires at the same time. I didn't say that the stenographers were there for the purpose of correcting the conversation. The stenographers were there to take down anything in shorthand, anything that came over that they were on. The stenographers who were there were not particularly there for the purpose of checking up in that way between the conversations recorded and the conversations taken by the stenographers. That could be done, but no efforts were made to do so.

By Mr. Schwartz:

Q. These girls that were on the switchboard were not given any instructions to single out any particular call?

A. Not to my knowledge. You see those girls were not under my supervision, so I had nothing to do with it.

Q. The girls on the switchboard?

A. The switchboard and the monitor; only the recording apparatus.

Q. In other words you had how many employees in that place under your supervision?

A. Just two at a time.

Q. One on each machine?

A. Yes, sir.

Q. What came in over the switchboard you have no control of. I mean in other words your company had nothing to do with anyone else but the two operators?

A. That is all we were responsible for.

Mr. Schwartz: That is all.

Redirect examination.

By Mr. Kaufman:

I never put a tap on any telephone wire.

[fol. 585] FRANK E. SHEA, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Hardy: (1269)

I am now and for the past 45 years have been in the service of the United States Government. I have always been in the Postal Service branch and have been postal inspector for the past 25 years. I was assigned to the investigation of disability fraud cases in December 1936 and since that time up to the present moment. I have occupied all my time in connection with that investigation.

By Mr. Hardy:

Q. Inspector Shea, there was a conference in the United States Attorney's office, I think in January, 1937. I want

you to tell the court and jury who were there and what was the subject of the conversation.

Mr. Stryker: I object to it as pure hearsay. It can not have any bearing on any issue in this case, your Honor.

The Court: Sustained. What is the bearing? I will allow you to develop it, Mr. Hardy, what the point is.

Mr. Stryker: Obviously conversations in Mr. Hardy's office are no more germane than made in any other lawyer's office.

The Court: As a result of the conversation did you receive certain instructions?

Mr. Hardy: I was leading up to that, your Honor.

The Witness: I did, your Honor.

Q. Will you proceed and tell what the discussion was and who were there and what instructions you received.

Mr. Stryker: I object to it. What the men did there, if germane, is admissible. The conversations in Mr. Hardy's office are no more admissible than conversations in any other lawyer's office.

The Court: Normally they would not be. If you want to come up here, Mr. Hardy and you other lawyers, and tell me what the point is you may do so.

[fol. 586] (Conference between Court and counsel, not within the hearing of the jury.)

The Court: You may ask him if he received instructions and what he then did.

In January 1937 I received instructions from Mr. Hardy to tap the wires of Dr. Hirsch L. Messman and the Weiss brothers. I was instructed to have those wires tapped at the earliest possible moment and not only get stenographic notations in reference to the calls, but if possible to have a sound recording put in, so that the stenographic record would be corroborated by the sound recording.

I personally knew John S. Hardy for many years; in fact I worked for him in other cases and I knew he had such devices, and I went to his office and put the proposition before him, and he agreed to supply me with the records.

I then got in touch with the Police Department, Deputy Chief Inspector John A. Lyons, who is now Deputy Commissioner, and told him my problem. He appointed Detective McGlynn and Detective Lewis to tap the wires. On January 28th I went to the neighborhood of where Dr. Messman lived. He lives at 315 Central Park West, and

the detectives decided that the best place to bring the wires in was at 32 West 91st Street. I went to that place, saw the landlord and told him I am Post Office Inspector Shea, and I am doing some government work, and I wished to hire the rear apartment, and I paid him, and that evening Mr. Harley came with the recording apparatus and we installed it. The next morning, January 29th, started to work. Mr. Irving Kaufman, Assistant United States Attorney, came up there and saw how the apparatus worked.

From that time until a short time after the arrest of Dr. Messman those machines were in constant operation under my supervision, and each day, or rather each night, the records were brought to this building to Mr. Hardy's office or to my office, where I supervised the initialing, to see that everything was regular as to date, time of call, the operators on the machines were on there and also the stenographers. I then filed them away personally in a locked cabinet where no one had access to it but the Assistant United States Attorney's office.

[fol. 587] By Mr. Hardy:

Q. Now will you tell us about tapping Weiss Brothers' wires. What did they do there?

A. That was later on. We tapped the Weiss's five wires on February 23rd. In company with the detectives we found that we could only get into an office building at 1200 Broadway. On account of the secrecy of the case and also due to the fact that we had to get a lease, I spoke to Mr. Bernstein and asked him could he obtain and somebody take a lease of the place only during this operation at 1200 Broadway. He did so, and later on when this case was over I went to the owner of the place and had the lease cancelled, and told him it was entirely a government proposition.

Q. Did Mr. Bernstein go to either one of the places where this recording machine was installed and listen to the conversations?

A. No. He was there the first night, he was rather curious to see how the thing operated, and I didn't see him there after that. In the same instance I saw him at 1200 Broadway for a short time.

Q. Did you listen to any conversation yourself?

A. I did. In fact during all the wire tapping I worked with the police. I also verified the fact we are on the right

wire after the police had, so that no mistake would be made. I also listened to the conversations.

For the past 20 to 25 years, I have supervised wire tapping on behalf of the Government, and principally since the Gerald Chapman case in 1921. There were certain stenographers furnished in connection with the wire tapping in this case. Those stenographers took down through earphones the conversations and calls that came over the two different telephones, and they supplemented, as a matter of fact corroborated the sound recordings. They were also filed in the office of the United States Attorney.

By Mr. Hardy:

Q. Where did those girls come from, what office?

A. We didn't have any girls, so we got girls from Mr. Silver and Mr. Bernstein. I knew Mr. Silver when he was [fol. 588] an assistant United States Attorney and when he was chief of the Bureau of Indictments.

Q. Do you know Mr. Bernstein?

A. I don't know him so well, but I knew he was a law partner of Mr. Silver.

Q. Do you know a lawyer by the name of Pantaleoni?

A. Very well. He was also an assistant United States Attorney about ten years ago. He is a lawyer now, and I understood later that these lawyers also represented the insurance companies.

Q. Now when you saw Mr. Simpson supervising the recording machines, did he have any assistants with him?

A. He had one assistant that would relieve him at times when he would go out for lunch, and that was all.

Q. How often would you go to the premises where these recording machines were located?

A. Several times a week or at any time when I thought I ought to be around there.

I recall the names of the stenographers that were used in taking down these wire taps. Those girls were Sylvia Schwartz, Irene Meyers, Marcia Meyers, Margaret Hartert, Olga Romano, Bessie Metcalf. I think that is about all. These young ladies alternated between two places, namely, 91st Street and 1200 Broadway. These girls operated from both of these places and they conferred with me almost daily.

By Mr. Hardy:

Q. When these discs were brought here, you said each day——,

A. Each day, each evening.

Q. Did you check those discs to see if they were labeled?

A. I did. Before I filed them away I went over to see if four or five different notations that would identify each record would be on one, as to location, whether 91st Street or whether 1200 Broadway; also as to the date and the operator, and also the time the record was taken, the hour of the call.

Q. Now in the wire tapping on the Messman wire, how many notations were placed on each disc?

A. There are only five on that because we just had one telephone. Dr. Messman had only one phone, and therefore [fol. 589] we had only one notation. That was 91st Street for the location; and then the other five notations on the Weiss's.

Q. How many notations on the Weiss wires?

A. Six.

Q. Why did you have to have one more than on the Messman wire?

A. For the simple reason there were five wires involved in the Weiss cases.

Q. Now did you make any arrangements with Mr. Hardy about his fee?

A. I did.

Q. Charges for the use of the recording machines?

A. I did not.

Q. Do you know who paid his bill?

A. I believe Mr. Silver and Mr. Bernstein.

Q. The government didn't do it as far as you know?

A. No, sir, as far as I know.

Mr. Stryker: No questions.

Mr. Hardy: Wait a minute.

Mr. Stryker: I thought you were through, Mr. Hardy.

Q. Inspector, did Mr. Harley have anything to do with this investigation so far as you know except to furnish recording machines?

A. He had nothing whatsoever to do with the investigation. The only thing Mr. Harley asked me was had the

police tapped the wires. He said otherwise he would not go in on the case. That was the only question he asked me.

Q. As a matter of fact, didn't you bring him down to my office on one occasion when he said he would not go ahead unless he received authority from the government?

A. That is true. That is what I referred to.

Q. Did you have any fund in your possession to pay for the recording machine?

A. I did not.

Q. Do you know the connection of Mr. Pantaleoni in this matter or his firm?

A. I do.

Q. Pantaleoni is a member of the firm of Hodges, Reavis, Pantaleoni & Downey, and they also represent the insurance companies and he is a member of that firm?

A. Yes, sir.

Q. And Frank Reavis is a former assistant United States Attorney?

[fols. 590-2032] A. Yes, sir, I knew him. He used to be here in the office of the United States Attorney.

Mr. Hardy: That is all.

Mr. Stryker: No questions.

Mr. Hardy: Your Honor, it will take a few minutes to get Dr. Messman down.

The Court: Will he be the next witness?

Mr. Hardy: Yes, your Honor.

The Court: We will take a recess now until 2 o'clock.

(Recess at 2 P.M.)

[fols. 2033-2067] Martin Gross, called as a witness on his own behalf, first being duly sworn, testified as follows: (4079)

[fols. 2068-2604] Cross-examination.

By Mr. Dailey: (4189)

[fols. 2605-2615] Motion to Set Aside Verdict—J. J. Weiss

Mr. Stryker: If your Honor please, I move in behalf of the defendant J. J. Weiss to set aside the verdict on the ground that the same is contrary to the law, contrary to the evidence, contrary to the weight of evidence, upon all

the objections and exceptions taken throughout the course of this trial, and particularly and specifically upon the objections and exceptions with relation to the introduction of wire tapping evidence, in violation, as I claim, of the Federal Communications Act and of the Fourth and Fifth Amendments of the United States Constitution, and on the same grounds I move an arrest of judgment.

MOTION TO SET ASIDE VERDICT—MARTIN GROSS

Mr. Friedman: I make a similar motion on behalf of the defendant, Martin Gross, and in addition to the grounds specified by Mr. Stryker, I make my motion on the ground that the action of the trial court, whom we all respect, in directing the jury to return a verdict in a conspiracy case——

[fol. 2616] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION SETTLING BILL OF EXCEPTIONS

It is Hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto, that the foregoing is a true transcript of the record of the said District Court, in the above entitled matter as agreed on by the parties and contains all the evidence taken on the trial of this action; that the same has been prepared within the time allowed by law and the Court, and that it may be settled and ordered on file as the Bill of Exceptions herein.

Dated: New York, September 30, 1938.

Lamar Hardy, Attorney for Plaintiff-Respondent. Lloyd P. Stryker, Attorney for Defendant-Appellant, Joseph J. Weiss. Schwartz & Frohlich, Attorneys for Defendant, Maximilian Goldstein. Sylvan Schwartz, Attorney for Defendant, George [fol. 2617] Krupp. Jacob W. Friedman, Attorney for Defendant, Martin Gross.

[fol. 2618] In United States District Court, Southern District of New York

[Title omitted]

Order as to Record and Bill of Exceptions

Upon the stipulation of the United States Attorney for the Southern District of New York and the attorneys for the appellants, Joseph J. Weiss, Maximilian Goldstein, George Krupp and Martin Gross annexed hereto and dated the 30 day of September, 1938, it is

Ordered, that the foregoing record be ordered on file as the Bill of Exceptions and transcript of record in the above entitled matter.

Dated: New York, September 30, 1938.

Robert P. Patterson, U. S. D. J.

[fol. 2619] In United States District Court, Southern District of New York

[Title omitted]

Order Settling Bill of Exceptions

The foregoing is hereby certified and allowed as the Bill of Exceptions and comprises the record of all the material evidence in this case and of all the exceptions taken by the defendants Joseph J. Weiss, Maximilian Goldstein, George Krupp and Martin Gross herein at the trial hereof.

Dated: New York, September 30, 1938.

Robert P. Patterson, U. S. D. J.

[fol. 2620] In United States District Court for the Southern District of New York

[Title omitted]

Notice of Appeal of Joseph J. Weiss

Name and address of appellant:

Joseph J. Weiss, 1540 54th Street, Brooklyn, N. Y.

Name and address of appellant's attorney:

Lloyd Paul Stryker, 40 Wall Street, Borough of Manhattan, New York City.

Offense:

(a) Counts 1 to 19 charge use of the mails in furtherance of the scheme to defraud certain insurance companies in violation of Title 18, U. S. C. Section 338, Section 215 U. S. C. C.

(b) Count 20 charged a conspiracy to use the mails to defraud in violation of Title 18, U. S. C., Section 88.

Date of Judgment: March 7, 1938.

Brief description of judgment or sentence:

Defendant was sentenced to three years on each of the counts numbered 1 to 19 inclusive, except counts 8 and 12 which were dismissed at close of Government's case; two years on count 20; all sentences to run concurrently.

Name of prison where now confined if not on bail:

The defendant has been released on his own recognizance pending the determination of his appeal.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the judgment above named, on the grounds set forth below.

Dated, New York, March 11, 1938.

Joseph J. Weiss, Appellant.

[fols. 2621-2625] GROUNDS OF APPEAL

1. The District Court erred in admitting into evidence discs containing the contents of a great number of telephone conversations and typewritten transcripts thereof, obtained as a result of tapping telephone wires, in violation of the Fourth and Fifth Amendments to the Constitution of the United States of America, in violation of Title 47 U. S. C. A., Section 605, otherwise known as the Communications Act (June 19, 1934, c. 652, Section 605, 48 Stat. 1103), in violation of the decision of the United States Supreme Court in United States v. Nardone, 302 U. S. 250, and in violation of Section 1423 of the Penal Law of the

State of New York, and that the District Court erred in permitting said discs to be played upon a phonograph machine before the jury.

2. The District Court erred in permitting witnesses to refresh their recollection from the aforesaid telephone conversations which were obtained by the tapping of telephone wires.

• • • • • • • •

[fols. 2626-2649] In United States District Court
Southern District of New York

[Title omitted]

Assignments of Error of J. J. Weiss

Now comes Joseph J. Weiss, one of the defendants herein, and files the following assignment of errors and respectfully shows that error has intervened to his prejudice, to wit:

• • • • • • • •

[fol. 2650] (20) The District Court erred in admitting into evidence, over objection and exception of counsel, discs recording the contents of a great number of intrastate telephone conversations and the typewritten transcripts of said discs, said records having been obtained as a result of the tapping of telephone wires, in violation of the Fourth and Fifth Amendments to the Constitution of the United States of America, Title 47 U. S. C. A., section 605, otherwise known as the Communications Act (June 19, 1934, c. 652, section 605, 48 Stat. 1103), the decision of the United States Supreme Court in United States v. Nardone, 302 U. S. 250 and Section 1423 of the Penal Law of the State of New York, and that the District Court erred in permitting said discs to be played upon a phonograph machine before the jury.

Post Office Inspector Frank Shea testified that following a conference in the United States Attorney's office in January 1937, he received instructions to tap the wires of Dr. Hirsch L. Messman and J. J. & A. L. Weiss and not only to get stenographic records, but if possible, to have a sound recording machine so that the stenographic record would be corroborated by the sound recording. He communicated with the Police Department of the City of New York.

Two city detectives made the physical taps. Dr. Messman's wire was tapped on January 28, 1937 and the Weiss wires were physically tapped on February 23, 1937. He communicated with John S. Harley who agreed to supply him with the sound recording apparatus, which was installed. The Government did not pay for the use of the recording machines. It was paid for by Mr. Silver and Mr. Bernstein who represented the insurance companies. Certain stenographers took, through the ear phones, the conversations. These girls were furnished by Mr. Silver and Mr. Bernstein who represented the insurance companies. The records were brought to Mr. Harley's office or to Inspector [fol. 2651] Shea's office where he supervised the initialing and filed them in a cabinet. Mr. Simpson of the Hartley Private Detective Agency, who supervised the mechanical recording apparatus, testified:

"Q. And I think you told Mr. Kaufman on your direct examination, correct me if I am in error, that there were some 1400 records made? A. No, I didn't.

Q. Give me your best answer. I don't care for an exact number. A. It probably was that number, might have been a lot more, as far as I can recall.

Q. Now some of these calls that you listened in on were calls to Philadelphia, Boston and other places outside of the State, were they not? A. Might have been. Any call that came in would be recorded and listened to, any call going out. I couldn't tell you where from.

Q. If any call was made on the Weiss brothers' wires during this time, you listened in and recorded it? A. Yes, sir.

* * * * * * *

Q. Well then all the business that was transacted over the Weiss wires with whatever private clients they were, and whatever it was, entirely unrelated to the case involved here, were all listened in on and put on record? A. Every ingoing and outgoing call was recorded." (Underscoring ours.)

Counsel for the defendant Joseph J. Weiss objected to the admission into evidence of the recorded telephone conversations obtained as a result of tapping of wires and the typewritten transcripts thereof and the reading of said transcripts and the playing of the records, upon the

ground that they were obtained as a result of tapping telephone wires in violation of the Fourth and Fifth Amendments of the Constitution of the United States of America, in violation of Title 47, U. S. C. A. section 605, in violation of the decision of the United States Supreme Court in United States v. Nardone and in violation of the Penal Law of the State of New York, and excepted to the Court's overruling said objection and permitting said recorded conversation and typewritten transcripts thereof to be received in evidence to be read and to be played.

It is understood between Court and counsel that the said objection which was raised to the introduction of the first [fol. 2652] telephone record and typewritten transcripts and the exception to the Court's ruling thereon was a general blanket objection covering all wire taps and the typewritten records thereof, typewritten transcripts thereof and the information so used.

"Mr. Stryker: Pardon me, there seems to be some confusion as to whether I have taken the objection, whether it applies. I thought it applied all the way through.

The Court: I will so understand it. You made it clear on the record.

Mr. Stryker: I thought I made it clear, your Honor.

. . . . . .

"Q. Did you recognize Mr. Weiss's voice? A. Yes, sir.

Mr. Dailey: I will have this played.

Mr. Stryker: It is some time since this happened and I presume my understanding of the circumstances is that this is all subject to the objection I made so many days ago.

The Court: Yes. Many of these telephone calls have been put in evidence either as records or typewritten statements, purporting to be copies of records, and they are all taken over the objection of the defendants and an exception to the defendants.

. . . . . .

"Q. Did you have that conversation? A. Yes, sir.

Mr. Dailey: And Mr. Stryker will concede the qualification of the record and the transcript; is that so?

Mr. Stryker: Yes.

Mr. Dailey: I offer them in evidence.

(Government's Exhibits Nos. 218 and 218-A for Identification received in evidence.)

The Court: There is no objection beyond the running objection?

Mr. Stryker: Yes, I understand that the general objection covers all of these.

The Court: Yes. That is my understanding."

The United States Attorney conceded in his summation [fols. 2653-2654] that the tapping records were the "crux of this case * * *."

* * * * * * * *

[fols. 2655-2656] Wherefore, the defendant Joseph J. Weiss prays that the judgment herein be reversed, and that the sentence imposed on said judgment be set aside

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[fol. 2657] In United States District Court, Southern District of New York

[Title omitted]

Notice of Appeal of Dr. Maxmilian Goldstein

Name and Address of Appellant:
Maximilian Goldstein, 829 Park Avenue, New York, N. Y.

Name and Address of Appellant's Attorneys:
Schwartz & Frohlich, 1450 Broadway, Borough of Manhattan, New York City.

Offense:
Violation of Title 18, Section 338 of the United States Code (U. S. Criminal Code, Section 215) and Title 18, Section 88 of the United States Code (U. S. Criminal Code, Section 37).

The indictment consisted of twenty counts, viz.:

(a) Counts 1 to 19 inclusive charged appellant with using the mails for the purpose of executing an alleged scheme and artifice to defraud in violation of 18 U. S. C., Section 338 (U. S. Criminal Code, Section 215).

(b) Count 20 charged appellant with conspiring to commit an offense against the United States, to wit, to violate 18 U. S. C. Section 338, in violation of 18 U. S. C. Section 88 (U. S. Criminal Code, Section 37).

Counts 8 and 12 were dismissed at the close of the Government's case.

Date of Judgment:
March 7, 1938.

Brief Description of Judgment or Sentence:
Upon Counts 1 to 7, and Counts 9 to 11, and Counts 13 to 19, the Court sentences the appellant to imprisonment for one year and one day; upon Count 20, the Court sentences the appellant to one year and one day, all sentences to run concurrently with each other; no fine was imposed upon the appellant.

Name of Prison where now confined if not on bail:
Appellant was released on his own recognizance pending [fol. 2658] appeal by order of Hon. Robert P. Patterson, United States District Judge.

I, the above named appellent, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the judgment above mentioned, on the grounds set forth below.

Dated, New York, March 11, 1938.

Maximilian Goldstein, Appellant.

GROUNDS OF APPEAL

* * * * * * *

[fol. 2659] 10. The Court erred in admitting, over objection of the appellant, evidence as to the contents of telephone conversations obtained as a result of and by means of the tapping of telephone wires, in violation of the pro- [fol. 2660] visions of 47 U. S. C. A. Section 605 (Act of June 19, 1934, C. 652 Section 605, 48 Stat. 1103), the provisions of the Fourth and Fifth Amendments to the Constitution of the United States, and the provisions of Section 1423 of the Penal Law of the State of New York, to which rulings the appellant duly excepted.

11. The Court erred in permitting, over the objection of appellant, the playing of phonograph records and the reading of transcripts purporting to set forth the contents of

telephone conversations obtained as a result of and by means of the tapping of telephone wires, in violation of the provisions of 47 U. S. C. A. Section 605 (Act of June 19, 1934, C. 652, Section 605, 48 Stat. 1103), the provisions of the Fourth and Fifth Amendments to the Constitution of the United States, and the provisions of Section 1423 of the Penal Law of the State of New York, to which rulings the appellant duly excepted.

• • • • • • •

[fols. 2661-2666] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENTS OF ERROR OF MAXIMILIAN GOLDSTEIN

Now Comes Maximilian W. Goldstein, one of the defendants herein and files the following assignment of errors, which he avers occurred upon the trial of this case and prejudiced his rights, and to which exceptions were taken, to wit:

• • • • • • •

[fol. 2667] (q) The District Court erred in admitting into evidence, over objection and exception of counsel, discs recording the contents of a great number of intrastate telephone conversations and the typewritten transcripts of said discs, said records having been obtained as a result of the tapping of telephone wires, in violation of the Fourth and Fifth Amendments to the Constitution of the United States of America, Title 47 U. S. C. A., section 605, otherwise known as the Communications Act (June 19th, 1934, c. 652, section 605, 48 Stat. 1103), the decision of the United States Supreme Court in United States v. Nardone, 302 U. S. 250 and Section 1423 of the Penal Law of the State of New York, and that the District Court erred in permitting said discs to be played upon a phonograph machine before the jury.

(r) The United States Attorney conceded in his summation that the wire tapping records were the "crux of this case" • • •."

• • • • • • •

(4) The District Court erred in admitting into evidence, over the objection and exception of counsel, evidence which had been obtained as a result of the tapping of telephone wires in violation of the Fourth and Fifth Amendments of the Constitution of the United States, and in violation of the Federal Communications Act, the decision of the United States Supreme Court and in violation of the Penal Law of the State of New York, and the District Court, erred in [fols. 2668-2671] permitting discs recording the contents of a great number of intrastate telephone conversations to be played upon a phonograph machine before the jury.

* * * * * * *

[fol. 2672] Wherefore, defendant Maximilian Goldstein prays that the judgment herein be reversed and that the sentence imposed on said judgment be set aside.

Schwartz & Frohlich, Attorneys for Defendant Maximilian Goldstein.

[fol. 2673] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL OF MARTIN GROSS

Name and Address of Appellant: Martin Gross, 2523 Wallace Avenue, Bronx, New York.

Name and Address of Appellant's Attorney: Jacob W. Friedman, No. 160 Broadway, Borough of Manhattan, New York City.

Offense: Use of mails to defraud; and conspiracy.

Date of Judgment: March 7th, 1938.

Description of Judgment or Sentence: 3 years imprisonment on each mail fraud count; 2 years imprisonment on conspiracy count, all sentences to run concurrently.

Prison where now Confined: Bail continued pending appeal.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the judgment above mentioned on the grounds set forth below.

(Signed.) Martin Gross, Appellant.

Dated New York City, March 11, 1938.

SUCCINCT STATEMENT OF GROUNDS OF APPEAL

1. The District Court committed error in receiving evidence, over objection and exception, certain phonograph records, in permitting them to be played before the jury and in permitting the jury to read what purported to be verbatim transcripts thereof, although it appeared that these records and transcripts had been made by the surrep-tious and illegal tapping of telephone wires, in violation of state and federal law and in violation of the constitutional rights of this appellant.

2. The District Court committed error in permitting witnesses, over objection and exception, to use the aforesaid records and transcripts thereof to refresh their recollections, all of which was illegal as aforesaid.

[fols. 2674-2675] 3. The District Court committed error in permitting this appellant, over objection and exception, to be cross-examined in an improper and prejudicial manner concerning the details of an apparent dictographic record of a purported conversation.

• • • • • • •

[fol. 2676] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENTS OF ERROR OF MARTIN GROSS

Now comes Martin Gross, one of the defendants herein, and files the following assignment of errors and respectfully shows that error has intervened to his prejudice, to wit:

(1) This defendant hereby reassigns, reiterates, realleges and incorporates herein with the same force and effect as if herein again set forth in extenso, all of the errors and specifications of error contained in the assignment of errors filed herein by the defendant Joseph J. Weiss.

(2) The District Court permitted this defendant, over objection and exception, to be cross-examined in an improper and prejudicial manner concerning the details of an apparent dictographic record of a purported conversation.

• • • • • • •

[fol. 2677] Wherefore, the defendant Martin Gross prays that the judgment herein be reversed and that the sentence imposed thereon be set aside.

New York City, September 26th, 1938.

Jacob W. Friedman, Attorney for Defendant Martin Gross, 160 Broadway, Borough of Manhattan, New York City.

[fol. 2678] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL OF GEORGE KRUPP

Name and address of appellant—Dr. George Krupp, 886 Fairmont Place, Bronx, New York.

Name and address of appellant's attorney—Sylvan Schwartz, 527 Fifth Avenue, New York City, N. Y.

Offense—Using the mails in furtherance of the scheme to defraud certain insurance companies in violation of Title 18, U. S. C., section 338, section 215 U. S. C. C. and a conspiracy to use the mails to defraud in violation of Title 18, U. S. C. section 88.

Date of Judgment—March 7, 1938.

Brief description of judgment or sentence—Defendant was sentenced to one year and one day on each of the counts numbered 1 to 7 and 14 to 20 inclusive; all sentences to run concurrently.

The defendant has been released on $1500.00 bail pending the determination of his appeal.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit, from the judgment above named on the grounds set forth below.

Dated, New York, March 9, 1938.

George Krupp, Appellant.

[fols. 2679-2681] GROUNDS OF APPEAL

First: The District Court erred in admitting into evidence discs containing the contents of a great number of telephone conversations and typewritten transcripts thereof, obtained as a result of tapping telephone wires, in violation of the

Fourth and Fifth Amendments to the Constitution of the United States of America.

Second: The District Court erred in admitting the aforesaid contents of a great number of telephone conversations obtained as a result of tapping telephone wires in violation of Title 47, U. S. C. A. section 605.

Third: The District Court erred in admitting the aforesaid contents of a great number of telephone conversations obtained as a result of tapping telephone wires, in violation of the decision of the United States Supreme Court in United States against Nardone, 302 U. S.

Fourth: The District Court erred in admitting the contents of a great number of telephone conversations obtained as a result of tapping telephone wires in violation of Section 1423 of the Penal Law of the State of New York.

* * * * * * *

[fols. 2682-2686] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENTS OF ERROR OF GEORGE KRUPP

Now Comes George Krupp, one of the defendants herein and files the following assignment of errors, which he avers occurred upon the trial of this case and prejudiced his rights, and to which exceptions were taken, to wit:

* * * * * * *

[fol. 2687] (q) The District Court erred in admitting into evidence, over objection and exception of counsel, discs recording the contents of a great number of intra-state telephone conversations and the typewritten transcripts of said [fols. 2688-2690] discs, said records having been obtained as a result of the tapping of telephone wires, in violation of the Fourth and Fifth Amendments to the Constitution of the United States of America, Title 47 U. S. C. A., section 605, otherwise known as the Communications Act (June 19th, 1934, C. 652, section 605, 48 Stat. 1103), the decision of the United States Supreme Court in United States v. Nardone,

302 U. S. 250 and Section 1423 of the Penal Law of the State of New York, and that the District Court erred in permitting said discs to be played upon a phonograph machine before the jury.

(r) The United States Attorney conceded in his summation that the wire tapping records were the "crux of this case • • •."

(4) The introduction of evidence obtained by means of the tapping of wires for the purpose of proving the conspiracy in which this defendant is claimed to have participated, was a violation of the laws of the United States and New York State and the evidence was in violation of the Fourth and Fifth Amendments of the Constitution of the United States of America, Title 47 U. S. C. A., Section 605, otherwise known as the Communications Act, the decision of the United States Supreme Court in United States v. Nardone, 302 U. S. 250, and Section 1423 of the Penal Law of the State of New York, and the District Court erred in permitting said discs or evidence obtained by this method to be presented to the jury.

[fol. 2691] Wherefore defendant George Krupp prays that the judgment herein be reversed and that the sentence imposed on said judgment be set aside.

Sylvan Schwartz, Attorney for Defendant, George Krupp.

[fol. 2692] IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

Order and Stipulation Fixing Time to Settle and File Bill of Exceptions.

ORDER—March 14, 1938

Upon reading and filing the annexed stipulation dated March 11, 1938, and upon all proceedings heretofore had herein, and the Court having granted the request of counsel for the appellants to settle and file with the clerk of this court a bill of exceptions on October 1, 1938, it is hereby

Ordered that the time of the defendants-appellants Joseph J. Weiss, Martin Gross, Maximilian Goldstein and George Krupp to procure to be settled and filed with the clerk of this court their bill of exceptions and assignment of errors and record an appeal, be and the same hereby is extended up to and including the 1st day of October, 1938. The term of this Court is hereby extended up to and including the 1st day of October, 1938.

Robert P. Patterson, United States District Judge.

[fol. 2693] [Title omitted]

STIPULATION

Whereas the Court, after the imposition of sentence in the above entitled matter on March 7, 1938, granted the request of counsel for the appellants to settle and file their bill of exceptions up to and including October 1, 1938, and the United States Attorney not having objected thereto,

It Is Stipulated by and between the attorney for the United States of America, appellee and the attorneys for the defendants-appellants in the above entitled matter, that the time of the said defendants-appellants to settle and file their bill of exceptions and assignment of errors and record on appeal, be and the same hereby is extended up to and including October 1, 1938, and that the term of this Court be and the same hereby is extended up to and including October 1, 1938.

[fol. 2694] Dated, New York, March 11, 1938.

Lamar Hardy, by Lamar Hardy, Attorney for Appellee; Lloyd Paul Stryker, Attorney for Defendant-Appellant, Joseph J. Weiss; Schwartz & Frohlich, Attorneys for Defendant-Appellant, Maximilian Goldstein; Jacob W. Friedman, Attorney for Defendant-Appellant, Martin Gross; Sylvan Schwartz, Attorney for Defendant-Appellant, George Krupp.

[fol. 2695] IN UNITED STATES DISTRICT COURT

C 100—451

Present: Hon. Robert P. Patterson, Judge.

U. S. Criminal Code, Section- 88 and 338 Title 18 U. S. C.

Using the mails in a scheme to defraud and conspiracy so to do.

UNITED STATES OF AMERICA

vs.

JOSEPH J. WEISS

JUDGMENT—March 7, 1938
(Joseph J. Weiss)

On motion of the United States Attorney, Ordered Sentence,

It is thereupon ordered and adjudged that the above named defendant be committed to the custody of the Attorney-General of the United States or his authorized representative, for imprisonment in a penitentiary for and during the term and period of

Three Years on each of counts 1-2-3-4-5-6-7-9-10-11-13-14-15-16-17-18-19. Two Years on count 20. All sentences to run concurrently. Bail continued pending appeal.

(March 8th, 1938—defendant paroled in own recognizance pending appeal.)

Robert P. Patterson, U. S. D. J.

COMMITMENT

(Joseph J. Weiss)

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF NEW YORK

The President of the United States of America:

To the Marshal of the United States for the Southern District of New York and to Warden of the U. S. Northeastern Pen. at Lewisburg, Penna.

Whereas the foregoing judgment and sentence was pronounced against the defendant named therein,

[fol. 2696] And, Whereas, the Attorney-General of the United States had designated the above named institution as the place of confinement where the said sentence shall be served,

Now, this is to command you, the said marshal, forthwith to take and safely transport to said institution and there deliver to the officer in charge thereof the aforesaid defendant together with a copy of this writ; and you the officer in charge of said institution to receive, keep and imprison said defendant in accordance with said sentence, or until said defendant shall be otherwise discharged by due course of law. If said prisoner shall have been committed to a jail or other place of detention to await transportation to the place at which said sentence is to be served, said sentence shall pursuant to law begin on the date on which said defendant was received at such jail or other place of detention.

Witness, the Hon. Robert P. Patterson, Judge of said Court and the seal thereof affixed at New York City in said district this 7th day of March, 1938.

Charles Weiser, Clerk. (Seal.)

[fol. 2697] In United States District Court

C 100—451

Present: Hon. Robert P. Patterson, Judge.

U. S. Criminal Code, Section- 88 and 338, Title 18 U. S. C.

Using the mails in a scheme to defraud and conspiracy to do so.

United States of America

vs.

Maximilian Goldstein

Judgment—March 7, 1938

(Dr. Maximilian Goldstein)

On motion of the United States Attorney, Ordered Sentence,

It is thereupon ordered and adjudged that the above named defendant be committed to the custody of the

Attorney-General of the United States or his authorized representative, for imprisonment in a penitentiary for and during the term and period of

One Year and one day on each of counts 1-2-3-4-5-6-7-9-10-11-13-14-15-16-17-18-19-20. All sentences to run concurrently. Bail pending appeal continued.

(March 8th, 1938—defendant paroled in own recognizance pending appeal.)

Robert P. Patterson, U. S. D. J.

[fol. 2698] COMMITMENT

(Dr. Maximilian Goldstein)

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF NEW YORK

The President of the United States of America:

To the Marshal of the United States for the Southern District of New York and to Warden of the U. S. Northeastern Pen. at Lewisburg, Penna.

Whereas the foregoing judgment and sentence was pronounced against the defendant named therein,

And, Whereas, the Attorney-General of the United States has designated the above named institution as the place of confinement where the said sentence shall be served,

Now, this is to command you, the said marshal, forthwith to take and safely transport to said institution and there deliver to the officer in charge thereof the aforesaid defendant together with a copy of this writ; and you the officer in charge of said institution to receive, keep and imprison said defendant in accordance with said sentence, or until said defendant shall be otherwise discharged by due course of law. If said prisoner shall have been committed to a jail or other place of detention to await transportation to the place at which said sentence is to be served, said sentence shall pursuant to law begin on the date on which said defendant was received at such jail or other place of detention.

Witness, the Hon. Robert P. Patterson, Judge of said Court and the seal thereof affixed at New York City in said district this 7th day of March, 1938.

Charles Weiser, Clerk. (Seal.)

[fol. 2699] IN UNITED STATES DISTRICT COURT

C 100—451

Present: Hon. Robert P. Patterson, Judge.

U. S. Criminal Code, Section- 88 and 338, Title 18 U. S. C.

Using the mails in a scheme to defraud and conspiracy so to do.

UNITED STATES OF AMERICA

vs.

MARTIN GROSS

JUDGMENT—March 7, 1938

(Martin Gross)

On motion of the United States Attorney, Ordered Sentence,

It is thereupon ordered and adjudged that the above named defendant be committed to the custody of the Attorney-General of the United States or his authorized representative, for imprisonment in a penitentiary for and during the term and period of

Three Years on each of counts 1-2-3-4-5-6-7-9-10-11-13-14-15-16-17-18-19. Two Years on count 20. All sentences to run concurrently. Bail continued pending appeal.

Robert P. Patterson, U. S. D. J.

[fol. 2700] COMMITMENT

(Martin Gross)

In the District Court of the United States of America, Southern District of New York:

The President of the United States of America:

To the Marshal of the United States for the Southern District of New York and to Warden of the U. S. Northeastern Pen. at Lewisburg, Penna.

Whereas the foregoing judgment and sentence was pronounced against the defendant named therein,

And, Whereas, the Attorney-General of the United States has designated the above named institution as the place of confinement where the said sentence shall be served.

Now, This Is To Command You, The Said Marshal, forthwith to take and safely transport to said institution and there deliver to the officer in charge thereof the aforesaid defendant together with a copy of this writ; and you the officer in charge of said institution to receive, keep and imprison said defendant in accordance with said sentence, or until said defendant shall be otherwise discharged by due course of law. If said prisoner shall have been committed to a jail or other place of detention to await transportation to the place at which said sentence is to be served, said sentence shall pursuant to law begin on the date on which said defendant was received at such jail or other place of detention.

Witness, the Hon. Robert P. Patterson, Judge of said Court and the seal thereof affixed at New York City in said district this 7th day of March, 1938.

Charles Weiser, Clerk. (Seal.)

[fol. 2701] IN UNITED STATES DISTRICT COURT

C 100-451

Present: Hon. Robert P. Patterson, Judge.

U. S. Criminal Code
Title 18 U. S. C.

UNITED STATES OF AMERICA

vs.

GEORGE KRUPP

JUDGMENT—March 7, 1938

(George Krupp)

On motion of the United States Attorney, Ordered Sentence,

It is thereupon ordered and adjudged that the above named defendant be committed to the custody of the Attorney-General of the United States or his authorized representative, for imprisonment in a penitentiary for and during the term and period of

One year and one day on each of counts 1-2-3-4-5-6-7-14-15-16-17-18-19-20. All sentences to run concurrently. Bail continued pending appeal.

Robert P. Patterson, U. S. D. J.

[fol. 2702] COMMITMENT

(George Krupp)

In the District Court of the United States of America, Southern District of New York:

The President of the United States of America:

To the Marshal of the United States for the Southern District of New York and to Warden of the U. S. Northeastern Pen. at Lewisburg, Penna.

Whereas the foregoing judgment and sentence was pronounced against the defendant named tehrein,

And, Whereas, the Attorney-General of the United States had designated the above named institution as the place of confinement where the said sentence shall be served.

Now, This Is To Command You, The Said Marshal, forthwith to take and safely transport to said institution and there deliver to the officer in charge thereof the aforesaid defendant together with a copy of this writ; and you the officer in charge of said institution to receive, keep and imprison said defendant in accordance with said sentence, or until said defendant shall be otherwise discharged by due course of law. If said prisoner shall have been committed to a jail or other place of detention to await transportation to the place at which said sentence is to be served, said sentence shall pursuant to law begin on the date on which said defendant was received at such jail or other place of detention.

Witness, the Hon. Robert P. Patterson, Judge of said Court and the seal thereof affixed at New York City in said district this 7th day of March, 1938.

Charles Weiser, Clerk. (Seal.)

[fol. 2703] In United States District Court, Southern District of New York

[Title omitted]

STIPULATION AND ORDER AS TO RECORD

It Is Hereby Stipulated And Agreed that the foregoing is a true copy of the transcript of the record in the case of United States of America v. Joseph J. Weiss, Dr. Maxi-

milian W. Goldstein, Dr. George Krupp and Martin Gross, as agreed upon by the parties.

Dated: New York, September 30, 1938.

Lamar Hardy, Attorney for Plaintiff Respondent. Lloyd P. Stryker, Attorney for Defendant Appellant, Joesph J. Weiss. Schwartz & Frohlich, Attorneys for Defendant, Maximilian Goldstein. Syl- [fol. 2704] van Schwartz, Attorney for Defendant, George Krupp. Jacob W. Friedman, Attorney for Defendant, Martin Gross.

ORDER

Upon the above stipulation it is

Ordered, that the foregoing typewritten record be filed in lieu of the original papers for the purpose of certifying the record on appeal.

Dated: New York, September 30, 1938.

Robert P. Patterson, U. S. D. J.

[fol. 2705] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

UNITED STATES, Plaintiff-Appellee,

v.

JOSEPH J. WEISS, ET AL., Defendants-Appellants

ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS— August 19, 1938

A motion having been made herein by counsel for the appellants for leave to prosecute the appeal in *forma pauperis;*

Upon consideration thereof it is ordered that said motion be and hereby is granted,—three typewritten copies of the record and appellants' brief to be filed.

William Parkin, Clerk. By D. E. Roberts, Deputy clerk.

[fol. 2706] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 2706A] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT

[Title omitted]

STIPULATION AND ORDER EXTENDING TIME TO FILE TRANSCRIPT OF RECORD AND BILL OF EXCEPTIONS—Filed October 14, 1938

It is Hereby Stipulated by and between the attorneys for the respective parties hereto that the time to file the transcript of record and the bill of exceptions for all defendants-appellants herein is extended from the 1st day of October, 1938 to and including the 15th day of October, 1938.

Dated: New York, N. Y., September 30, 1938.

Lamar Hardy, United States Attorney; Lloyd Paul Stryker, Attorney for Joseph J. Weiss. Jacob W. Friedman, Attorney for Martin Gross; Sylvan Schwartz, Attorney for Dr. George Krupp; Schwartz and Frohlich, Attorneys for Dr. Maximilian Goldstein.

So ordered, Thomas W. Swan, U. S. C. J.

[File endorsement omitted]

[fol. 2707] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee,

against

JOSEPH J. WEISS, MARTIN GROSS, DR. GEORGE KRUPP AND DR. MAXIMILIAN GOLDSTEIN, Appellants,

and

DR. HIRSCH L. MESSMAN, BENJAMIN NELSON, HERMAN BERGER AND MORRIS SPITZ, Defendants

Before: Augustus N. Hand and Chase, Circuit Judges.

Appeal from the United States District Court for the Southern District of New York.

At the trial of the above action, in which the defendants Weiss, Gross, Dr. Krupp and Dr. Goldstein were indicted

under 18 counts for the use of the mails in execution of a scheme to defraud and under one count for conspiracy, Weiss, Gross and Dr. Goldstein were convicted under all counts except 8 and 12, and Dr. Krupp was convicted under all counts except 8, 9, 10, 11, 12 and 13. From the judgment of conviction each defendant has appealed.

Affirmed.

[fol. 2708] Lloyd Paul Stryker, Attorney for appellant Weiss; Lloyd Paul Stryker and Harold Shapero, Counsel.

Schwartz & Frohlich, Attorneys for appellant, Dr. Goldstein; Theodore Kiendl and Arthur Schwartz, Counsel.

Sylvan Schwartz, Attorney and counsel for appellant Dr. Krupp.

Jacob W. Friedman, Attorney and counsel for appellant Gross.

Lamar Hardy, United States Attorney for the Southern District of New York, for appellee; John F. Dailey, Jr., and Irving R. Kaufman, Assistant United States Attorneys, counsel.

OPINION

Augustus N. Hand, Circuit Judge:

The appellants J. J. Weiss, Gross, Dr. Krupp and Dr. Goldstein were convicted under Title 18, Section 338, U. S. C., of the use of the mails in the execution of a scheme to defraud, and under Title 18, Section 88 U. S. C., of a conspiracy therefor. The scheme involved was to defraud insurance companies by filing false claims representing that the defendants Nelson, Berger and Spitz were permanently and totally disabled when in fact they were not. All three claimants pleaded guilty and testified for the government. Three doctors participated in the scheme, to wit, the defendants Messman, who testified for the government and pleaded guilty, and the defendants Goldstein and Krupp who stood trial. The other defendants who were indicted for the scheme were the defendants J. J. Weiss and A. L. Weiss, lawyers, and Martin Gross, their runner. Owing to illness the defendant A. L. Weiss obtained a severance during the course of the trial. Defendant J. J. Weiss stood trial and toward the end of the trial conceded that there was no doubt that the claims of defendants Spitz,

Berger and Nelson were fraudulent. The chief issue of fact [fol. 2709] for the jury was whether the defendants who stood trial and have taken an appeal, namely, Weiss, Gross, Dr. Krupp and Dr. Goldstein, participated in the filing of the false claims with guilty knowledge.

Before discussing the merits of the case, we shall deal with the evidence of telephone communications intercepted by means of socalled "wire tapping" by government agents. The appellants say that the admission of that evidence was an error sufficient in itself to call for the reversal of the judgment, irrespective of any other objection. They chiefly rely on the decision of the Supreme Court in Nardone v. United States, 302 U. S. 379, which was rendered on an appeal from this court. United States v. Nardone, 90 F. (2d) 630, (C. C. A. 2). There both interstate and intrastate telephone messages were intercepted through wire tapping and used as proof in a criminal trial. We held that under Section 605 of the Federal Communications Commission Act (U. S. C. Title 47, Chapter 5, § 605) interstate communications were not inadmissible and assumed that the act did not cover the intrastate messages. The Supreme Court reversed our decision on the ground that the use of interstate messages as evidence was essentially forbidden by the clause of § 605 supra which provides that: "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person".

In reaching the above conclusion it cannot be supposed that the Supreme Court was intending to deal with anything but the admissibility of interstate communications, for [fol. 2710] they were the only messages, the reception of which we had treated as open to doubt. Moreover, the context of the Federal Communications Act seems to limit the application of § 605 to interstate and foreign messages. As declared in the first section of the act (U. S. C. Title 47, § 151) the Communications Commission was created for the purpose "of regulating interstate and foreign commerce in communication by wire and radio". In the next section it was provided that:

"(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio * * *

"(b) Subject to the provisions of section 301, nothing in this chapter shall be construed to apply to or give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service of any carrier, * * *."

It is argued that because the clause of §605 on which the Supreme Court relied in Nardone v. United States, 302 U. S. 379, is general in its language prohibiting interception and disclosure of communications while the other clauses of §605 are in terms limited to "interstate or foreign communications" it embraces intrastate messages. This seems to us a forced construction which flies in the face of the first and second sections of the act that we have quoted. Moreover, the third clause of §605, which provides that "no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto" contains a limitation to in- [fol. 2711] terstate and foreign communications which is repugnant to the supposed unlimited prohibition of the second clause. It should also be noticed that the second clause of Section 605, which was relied on by the Supreme Court in Nardone v. United States, supra, prohibits intercepting and divulging or publishing the contents of intercepted messages. It cannot be maintained that intercepting alone is prohibited and that the clause relates to intrastate as well as to interstate and foreign messages because interception would affect both. Divulging one or the other can be readily dealt with separately and the section as a whole seems only to forbid divulging interstate or foreign messages. We, therefore, regard the decision of the First Circuit in Valli v. United States, 94 F. (2d) 687, rather than that of the Sixth Circuit in Diamond v. United States, 94 F. (2d) 1012, or of the Third Circuit in Sablowsky v. United States of America, 101 F. (2d) 183, as properly interpreting § 605. We realize that in United States v. Olmstead, 277 U. S. 438, three of the minority took the view that wire tapping in violation of a state penal statute was so contrary to good morals that messages thus obtained ought not to be admitted in evidence in a United States court, and that Justices Brandeis, Butler and Stone said that the

messages were obtained in violation of the Fourth Amendment of the Constitution and their admission under objection was a violation of the Fifth Amendment. In the present case, however, no law of New York prohibited obtaining messages by wire tapping. Messages thus obtained are admissible in the New York courts and the government in using them was not accepting the fruits of a crime as in United States v. Olmstead, 277 U. S. 438. We are bound by the decision of the majority in the latter case and are im- [fol. 2712] pressed by the omission of the Supreme Court to say that Section 605 is broad enough to include intercepted intrastate messages though it relied on that section to support its decision in United States v. Nardone, 302 U. S. 379, that intercepted interstate messages were improperly admitted in evidence. In spite of some hesitation because of the decisions in Sablowsky v. United States, 101 F. (2d) 183, and Diamond v. United States, 94 F. (2d) 1012, and of the dissenting opinion of Judge Morton in Valli v. United States, 94 F. (2d) 687, we hold that there was no error in admitting the proof derived through wire tapping.

The point is made that one of the communications obtained through wire tapping and admitted in evidence (Exhibit 307) was an interstate call. That conversation was between Weiss in New York and Gross whose definite whereabouts was not shown. But Gross once testified that he was in the traffic court at the time he called up Weiss. He afterwards said that he did not remember where he was. In the transcript of the conversation he, however, said to Weiss: "I'll be down in a few minutes." It is hard to believe he would have said this if he had been outside the state. We think there was enough to justify the trial judge in holding that Gross was within the state at the time and that the communication was intra-state. It is argued that, even if the conversations obtained through wire tapping were erroneously admitted, the error was not prejudicial because the factum of the conversations was conceded by the defendants affected. This argument is not convincing.

It may be said with some plausibility that the defendant Goldstein was not prejudiced since he was neither a party to, nor mentioned in the conversations obtained through [fol. 2713] wire tapping. These conversations, however, showed that Goldstein's co-defendants were engaged in a conspiracy which other proof indicated that he joined. They also gave credence to the testimony of Messman. Such

evidence weighed against Goldstein and his conviction ought not to stand if the communications implicating the others were improperly received. As regards the defendant Krupp, he seems to have admitted the conversations in which he was concerned. But it cannot be said that evidence which he was compelled to explain and justify was not legally prejudicial if improperly admitted under his objection. The defendant Gross denied some of the conversations relating to him which were obtained through wire tapping. He was prejudiced by Exhibit 142 containing an alleged conversation between himself and Nelson as to one Blumberg which he testified in fact referred to a person he only knew as Bromberg and not as Blumberg. Another alleged conversation between Gross and Weiss contained in Exhibit 307 and relating to fees to be charged by Weiss to one Spitz was not admitted by Gross and was highly prejudicial as tending to support the government's contention that Gross was a "runner" for Weiss. But even where the conversations were not denied or were conceded he was legally prejudiced by having to explain and justify evidence which he had challenged at the outset, unless it was properly admitted. The defendant Weiss is in the same position and his conviction can only stand if we are right in holding that the communications derived through wire tapping were competent evidence. Weiss, who was a party to conversations obtained through thirty-four wire taps was prejudiced by their admission unless they were lawfully received in evidence.

[fol. 2714] There can be no doubt that the government offered sufficient proof to go to the jury on all the evidence submitted.

It is not questioned that Messman, Spitz, Berger and Nelson were engaged in committing frauds upon insurance companies through the filing of false claims representing that Nelson, Berger and Spitz were disabled when in fact they were not. There likewise can be no doubt that each of the appellants assisted in promoting at least some of the claims against the insurance companies. The defendant Weiss assisted in all three cases, as did Gross. The defendant Krupp gave a medical certificate in the Spitz case, the defendant Goldstein gave a certificate in the Nelson case.

The trial judge directed the attention of the jury to the evidence showing conscious fraud on the part of the appel-

lants. In respect to the proof against the defendants Weiss and Gross he charged the jury that the testimony was to the general effect that Gross suggested the idea of creating false claims and asserted that he could put claimants in touch with a doctor who would tell them how to feign disease and deceive a company, and with lawyers who would direct the legal steps. The judge charged that there was testimony that Gross took the claimants to Messman,

"who prepared fictitious histories for them, told them what pains to complain of, in the cases of Nelson and Berger gave them pills, digitalis or urgininé, which would affect the electro-cardiogram or e k g that might be taken of them, and arranged to send them to hospitals, for which services Messman testified he was to receive substantial fees out of the moneys expected to be realized."

[fol. 2715] The Judge went on to say:

"Nelson and Berger testified that for some days before medical examinations they would take these pills, although neither of them liked them, and Nelson I believe testified they made him nauseous. These witnesses testified separately that they were brought separately to Weiss by Gross or Nelson or Messman and that Weiss passed upon papers they sent out; gave general directions; in the case of Spitz financed some of the hospital expenses and premium expenses; and Nelson and Berger testified that they were told to prepare for examination by Weiss. If the testimony of each of these four witnesses, or any one of them, is true in the main, then Gross and Weiss were active participants in the scheme and had guilty knowledge of the fact that the claims were fraudulent.

"There is testimony that in the Spitz case no directions were needed to be given and he did not take any drugs; and there is testimony that in the Spitz case a quarrel developed as to the size of the fee which the lawyers should have, which resulted in the lawyers eventually not taking up, or dropping, the Spitz case.

"Mrs. Berger was also a witness and she testified relative to the defendant Gross. According to her testimony she wanted Berger to get out of it. She was visited by the defendant Gross, so she said, that he came around and told her that she should not worry, that there was good money in it, the companies could afford to pay, and that people richer than she and Berger were doing it.

* * * * * * *

"As to the defendant Goldstein he is charged with having assisted in the Nelson claim, knowingly assisted in the Nelson claim, and the witnesses as to that phase of the case [fol. 2716] are Messman and Nelson. Spitz and Berger had no testimony to offer in that connection.

"Messman testified in substance that when he brought Nelson to be examined by Goldstein on December 19, 1934, he told Goldstein that he had been giving digitalis to Nelson, and, in substance, that it was a fake case. He testified that an e k g was taken on that day, which Goldstein told him later was 'not so hot'. He testified further that he later induced the defendant Goldstein to antedate an e k g, which he said was taken on July 15th, to antedate it to an earlier date, June 17th.

"The government claims that several papers around the summer of 1935 tend to bear out the testimony of Messman relative to the date when the e k g was actually taken. Nelson testified that an e k g was taken on December 19, 1934, and he testified that certain dates given in certificates signed by Goldstein were false; that he was not visited or treated by Goldstein on those dates.

"As to the defendant Krupp he is charged with having assisted only in the Spitz case. The testimony of Messman, Nelson and Spitz, not Berger, is to the effect that Krupp acted as Spitz's family doctor and pretended to have treated Spitz for heart attacks for a promised fee of $750. The testimony of Berger, except as to one meeting I believe, has nothing to do with the defendant Krupp."

While motions were made at the close of the case for the direction of a verdict for the defendants, there seems to have been no question about the correct summary by the Judge of the testimony against them. The errors, if any, which might lead to a reversal must depend upon the propriety of admitting conversations recorded through wire [fol. 2717] tapping, which we have already sustained, and the validity and importance of other objections, taken during the course of the trial, which are referred to hereafter.

It is argued on behalf of the defendant Goldstein that he was not shown to have been connected with any general conspiracy to defraud insurance companies but only with a specific plan of fraudulently obtaining disability payments for the defendant Nelson from a single insurance company. This, we think, is an unnecessary limitation of the inferences

which may be drawn against Goldstein. While there was no proof that Goldstein knew of the Spitz or Berger claims nevertheless Goldstein, in dealing with Nelson and Messman, showed such a familiarity with the sort of fraud involved in the indictment that a jury might well infer that he had become a participant in a general conspiracy on the part of Messman, Weiss, Nelson and others to defraud insurance companies. The following is part of the conversation between Messman and Goldstein as to the Nelson claim. Messman testified thus:

"This fellow outside, his name is Nelson. He is going to be a disability case. * * * I said to him, 'You remember the Weisses are quite liberal with payments to doctors, not like the Garrows', and Goldstein said, 'As far as the Garrows are concerned, we started them with a small fee, it is just too bad, it is pretty hard to get away from a small fee.' I said, 'Don't worry about this fellow here. We will get a nice fee now.' And later I said, 'You will get a still better fee from the Weisses directly.' He said, 'What are you going to claim?' I said, 'It is a heart case, not a t. b. case.' I said, 'The reason I brought him here is that I expect to take him to the hospital, and what is on my mind I want [fol. 2718] you to take his electrocardiogram to see if he is ready to go to the hospital, because I have given him digitalis in the past four or five days.' He said, 'How much digitalis did you give him?' And I said, 'Two tablets three times a day.' He figured out aloud how many tablets that would make, and he said, 'He is ready, probably ready, but' he said, 'you know I do not develop electrocardiograms here in my office, I develop them at the Sydenham Hospital.' I said, 'How will I know whether Nelson is ready or not?' He said, 'The situation is this. Apparently he is ready if he took what you say he has taken. Assume that the electrocardiogram I am going to take right away is not positive enough, then will he stay in the hospital, take another few tablets and then I will take another electrocardiogram in the hospital anyway, because that is part of the buildup.''

Moreover there was evidence that Goldstein had worked with Messman on the Hochberg case, that Hochberg was at the Sydenham Hospital and Goldstein extracted an electrocardiograph and tore it up. Though Goldstein denied that he tore up the test he failed to explain on cross-examination why one copy was not part of the hospital records as it

should have been. We think there was sufficient proof of a conspiracy to defraud insurance companies in which all defendants were engaged to support the jury's verdict. United States v. Graham (as yet unreported), Jarvis v. United States, 90 F. (2d) 243, 245, 246, (CCA.1), (Cert. denied 302 U. S. 705): Coates v. United States, 59 F. (2d) 173, 174, (CCA. 9).

[fol. 2719] The point is also made that Goldstein dropped out of the conspiracy after he gave the disability certificate in the Nelson case on September 23, 1935. But there not only was testimony by Messman that Goldstein was promised "further remuneration when the case was surrendered" (record p. 1005) but proof is lacking that he took any affirmative steps to withdraw from the conspiracy. Hyde v. United States, 225 U. S. 347; United States v. Graham, supra; United States v. Dubrin, 93 F. (2d) 499, 504. Accordingly the jury might find, as it did, that he was still in the conspiracy at the times of the mailing of the socalled "indictment" letters which were subsequent to September 23, 1935. But the mailing of the letter on June 21, 1935, charged in Count 9, occurred while Goldstein clearly was a party to a scheme to defraud insurance companies, so that, even though the proof showed Goldstein to be a participant in a limited conspiracy with Messman, Nelson and Weiss, instead of a conspiracy, as we hold, with all defendants, his conviction on Count 9 and on the conspiracy count could still be affirmed, in view of the charge of the court and the evidence, without prejudicing any substantial right which he could claim. See Berger v. United States, 295 U. S. 78.

The contention of the defendants that the judgment of conviction should be reversed because of errors due to alleged improper cross-examination needs little comment.

With respect to Weiss, his statement on direct that he had never had anything to do with a false claim left him open to a very broad cross-examination the proper bounds of which so far as they may have been occasionally exceeded were sufficiently cured by the admonitions of the court.

[fol. 2720] With respect to Gross, some of the questions asked, e. g., about the activities of his former associate Ellentuch and about the alleged confession of Schwartz (for whom Gross had filled out insurance forms) that Schwartz's claim was fraudulent and that Gross had suggested it, were improper. Indeed, the latter question was ruled out. The

same thing is true of certain other questions by counsel for the government which assumed facts without sufficient basis in the record. Some of these were excluded by the trial judge, who repeatedly cautioned the jury against taking assumed facts in place of proof. For example, at page 2092 of the record, he said:

"The jury have been told several times that they are not to assume the facts or to take the facts as proof, just because they are assumed in counsel's questions."

He also charged the jury (page 2595):

"Your verdict should be based upon the evidence alone, and not upon statements or charges that have been made that have no support in the evidence. By evidence I mean the exhibits marked in evidence and the oral testimony of the witnesses that were sworn."

It seems to us that there was such ample proof of guilt on the part of Gross that any excess zeal in the manner of cross-examination could not have affected the result.

With respect to Krupp, criticism is made of the cross-examination about a judgment by default, obtained against him by one of his patients, and apparently based upon charges of negligence. We do not think this item of evi- [fol. 2721] dence could have affected the result in view of the answers, but in any event regard its admission as a matter for the discretion of the trial judge.

With respect to Goldstein, complaint is likewise made of the extent of the cross-examination. In view of his own testimony on direct with reference to other disability cases, and his cross-examination of Messman as to the Hochberg case, we think the cross-examination was justified.

Some of the statements of the United States attorney in his summation are subject to criticism, but we cannot regard them as affecting the result or as anything like the damaging statements involved in Berger v. United States, 295 U. S. 78.

We have considered the other objections raised with respect to the conduct of the trial and find nothing calling for a reversal of the judgment of conviction.

Judgment affirmed.

Note: Judge Manton sat at the argument of this appeal but resigned before the opinion was written.

[fol. 2722] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

Present: Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

UNITED STATES, Plaintiff-Appellee,

vs.

JOSEPH J. WEISS, et al., Defendants-Appellants,

DR. HIRSCH L. MESSMAN, et al., Defendants.

JUDGMENT—filed April 13, 1939

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 2723] [File endorsement omitted.]

[fol. 2724] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 2725] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 5, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, limited to the question whether the trial court properly received in evidence intercepted telephone communications.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 2726] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING OF RECORD FOR USE OF WRIT OF CERTIORARI—Filed August 11, 1939

In view of the fact that this Court in granting a writ of certiorari in the above entitled cause limited its review to the question "whether the trial court properly received in evidence intercepted telephone communications," it will be unnecessary to a consideration of such question to print a substantial portion of the certified typewritten transcript of record filed in this Court in connection with the petition for writ of certiorari. It is therefore hereby stipulated by and between counsel for the parties to the above entitled cause that the Clerk shall be required to print only the following portions of such transcript:

I. Indictment and Docket Entries (Volume I of Record on Appeal).

(1) Page 4 to and including page 30.
(2) Page 34 to and including page 40.

II. Bill of Exceptions

(1) Volume I of Record on Appeal.

(a) Page 65.

(b) Page 112 down to and including the words "have pleaded guilty," with the exception of the sentence beginning with the words "I am 42 years of age."

[fol. 2727] (c) Page 215 beginning with the words "Mr. Kaufman: I ask that this be marked for identification" down to and including the words " 'Mrs. Messman: Yeah'." on page 229, but excluding the paragraph beginning with the words "Mr. Kaufman: Government's Exhibit 111" etc. on page 229.

(d) Page 270 beginning with the words "Mr. Kaufman: Your Honor, at this point" etc., down to and including the words "(Mr. Kaufman read Government's exhibits 123, 123a and 123b to the jury.)" on page 288, with the exception of two paragraphs on page 287, the first beginning with the words "I think I went to Mirchin's" and the second beginning with the words "I believe I saw Mr. Gross."

(e) Page 290 beginning with the words "Government's Exhibits 123 [124] and 124a" down to and including the

words "(Mr. Kaufman read Government's Exhibit 124a to the Jury.)".

(f) Page 296 beginning with the words "On Government's Exhibit 128" etc. down to and including the words "(Government's Exhibit 133a read to the jury.)" on page 299.

(g) Page 560 to and including page 590.

(2) Volume III of Record on Appeal.

(a) Page 2033, the first two lines.

(b) Page 2068, the words "Cross examination by Mr. Dailey".

(c) Page 2605 beginning with the words "Mr. Stryker:" down to and including the words "verdict in a conspiracy case ——".

(d) Page 2616 to and including page 2619.

III. Notices of Appeal, Assignments of Error, Judgments, etc.

(1) Volume III of Record on Appeal.

(a) Page 2620 to page 2621 down to and including the paragraph numbered "2".

(b) Page 2626 down to and including the words "to his prejudice, to wit:".

(c) Page 2650 beginning with the words "(20) The District Court erred" down to and including the words "'crux of this case * * *.'" on page 2653.

(d) Page 2655, the last two lines.

(e) Page 2657 down to and including the words "grounds of appeal" on page 2658.

(f) Page 2659 beginning with the words "10. The Court erred in admitting" etc. down to and including the paragraph numbered "11" on page 2660.

(g) Page 2661 down to and including the words "were taken, to wit:"

[fol. 2728] (h) Page 2667 down to and including the words "before the jury" on page 2668, except the paragraph numbered "(s)" on page 2667.

(i) Page 2672.

(j) Page 2673 down to and including the paragraph numbered "3" on page 2674.

(k) Page 2676 down to and including the paragraph numbered "(2)".

(l) Page 2677 beginning with the words "Wherefore" to the end of the page.

(m) Page 2678 down to and including the paragraph numbered "Fourth" on page 2679.

(n) Page 2682 down to and including the words "to which exceptions were taken, to wit:"

(o) Page 2687 beginning with the words "(q) the District Court erred" down to and including the end of page 2688 with the exception of the paragraph numbered "(s)".

(p) Page 2691.

(q) Page 2692 to and including page 2706.

(2) Volume IV of Record on Appeal.

(a) Page 2706A.

IV. Proceedings in Circuit Court of Appeals including Opinion, Judgment, etc. of that court.

It is further stipulated that 76 intercepted telephone communications were received in evidence; that both parties to 38 of these communications testified for the Government; that one of the two parties to 37 of the communications testified for the Government; that with respect to all of the communications which were introduced in evidence (except Government's Exhibit 307) each communication was admitted only after it had been identified by at least one of the parties thereto and that the parties identifying these communications were four of the defendants, three of whom had previously pleaded guilty to the indictment; and that the same procedure which was followed in introducing the communications referred to in the portions [fol. 2729] of the typewritten transcript of record herein stipulated to be printed, was followed in respect to the remainder of the 76 communications, i.e. each communication was introduced by reading to the jury a stenographic transcript thereof or by playing in open court a recording of the communication, or by both methods, and when a recording of a communication was played stenographic transcripts thereof were handed to each juror, or to every other juror, so that they could follow the recording while it was being played.

It is further stipulated that interstate telephone communications were transmitted over the same wire which was used in transmitting the intercepted intrastate telephone communications which were received in evidence.

It is further stipulated that each of the parties to the above entitled cause shall have the right to refer in his or its briefs and oral argument to any portions of the typewritten transcript of record filed in this Court on petition for writ of certiorari which are not contained in the record as printed pursuant to this stipulation, in the same manner as if the typewritten transcript had been printed in full.

Lloyd Paul Stryker, Counsel for Petitioner Joseph J. Weiss; Jacob W. Friedman, Counsel for Petitioner Martin Gross; Sylvan Schwartz, Counsel for Petitioner Dr. George Krupp; Theodore Kiendl, Counsel for Petitioner Dr. Maxmilian Goldstein; Edward Bell, Acting Solicitor General.

August 8, 1939.

[fol. 2730] [File endorsement omitted.]

[Endorsed:] File No. 43,424, U. S. Circuit Court of Appeals, Second Circuit, Term No. 42. Joseph J. Weiss, Martin Gross, Dr. George Krupp and Dr. Maximilian Goldstein, Petitioners, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed May 6, 1939. Term No. 42. O. T. 1939.